87-512

No. _____

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

DAVID BERRY'AN, an individual

PETITIONER,

VS.

HUGHES AIRCRAFT COMPANY, a corporation, Thomas W. Tong, an individual, A.H. Ruysser, an individual, Edward Kulyeshie, an individual, D.M. Sugden, an individual, Gerald Hermann, an individual, and Does 1 through 10, inclusive,

RESPONDENTS.

****

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

****

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In Propria Personae

September 26, 1987

QUESTIONS PRESENTED FOR REVIEW

This is an action brought under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e-2000e-17, providing for injunctive and other relief against discrimination in employment, and the Civil Rights Act of 1866, 42 U.S.C. § 1981, providing for the equal rights of persons in every state and territory within the jurisdiction of the United States to make and enter into contracts, alleging employment discrimination because of race or color, and under the Equal Pay Act, equal pay for equal work of the Fair Labor Standards Act of 1938, §§ 1 et seq; 6(D) as amended 29 U.S.C.A. §§ 201 et seq; 206(d); Civil Rights Act of 1964, § 703(a) (1) as amended 42 U.S.C.A. § 2000e-2(a) (1).

Thus, this case presents the following important questions which cry out for plenary consideration by this honorable court:

1. Whether Plaintiff suffered disparate treatment, disparate impact and discriminated

against by terminating him on June 17, 1983.

2. Whether Plaintiff was discriminated against by not selecting him for another position in which he applied for and were qualified for within the company prior to his termination.

3. Whether Plaintiff was paid less than white employees for substantially equal work in terms of the skill, efforts and responsibilities performed.

4. Whether Plaintiff suffered a continuing and extensive course of harassment of which defendants were aware and failed to take reasonable steps to remedy, acting willfully and maliciously, with a conscious and deliberate disregard of these actions.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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The Petitioner, David Berry'an, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on March 19, 1987.

OPINION BELOW

The Court of Appeals entered its Memorandum decision affirming the district court's judgment on 19 March 1987. A copy of the memorandum is attached as Appendix A.

The Court denied petitioner's petition for rehearing on 24 April 1987. A copy of the order is attached as Appendix B.

For further clarity the judgment and order of the District Court for the Central District of California in Los Angeles is set forth in Appendix C.

JURISDICTION

The Ninth Circuit's judgment became final on 19 March 1987. The jurisdiction of this court is invoked pursuant to Title 28 U.S.C.A. § 1254 (1) and Rule 19, Rules of the Supreme Court as amended in 1980.

STATUTES INVOLVED

The principles of law involved herein are found under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§2000e-2000e-17

17, providing for injunctive and other relief against discrimination in employment, and the Civil Rights Act of 1866, 42 U.S.C. § 1981, providing for the equal rights of persons in every state and territory within the jurisdiction of the United States to make and enter into contracts, alleging employment discrimination because of race or color, and under the Equal Pay Act, equal pay for equal work of the Fair Labor Standards Act of 1938, §§ 1 et seq.; 6(D) as amended 29 U.S.C.A. §§ 201 et seq.; 206(d); Civil Rights Act of 1964, § 703(a) (1) as amended 42 U.S.C.A. § 2000e-2(a) (1).

STATEMENT OF THE CASE

The District Court for the Central District of California in Los Angeles had subject-matter jurisdiction over this action pursuant to 28 U.S.C. §§ 1331 and 1343. This court has jurisdiction pursuant to 28 U.S.C.A. § 1254 (1) and rule 19, Rules of the Supreme Court as amended in 1980. The judgment entered by the District Court is a final decision which disposed of all claims and which is properly appealable to this Court.

Petitioner's appeal was timely filed, The District Court entered final judgment herein on December 4, 1985, and petitioner filed his Notice of Appeal on January 3, 1986. Petitioner's brief was due on May 12, 1986 and was filed and served on May 21, 1986. On that day, the petitioner submitted a motion for a nine day extension to file his brief, the petitioner's opening brief was filed on 8 September 1986. See Appendix D. The Court of Appeals entered its memorandum decision

affirming the District Court's judgment on 19 March 1987. See Appendix A. the Court denied petitioner's petition for rehearing on 24 April 1987. See Appendix B. The petitioner submitted a motion for stay of mandate on 30 April 1987, the petitioner Stay of Mandate was filed and granted on 30 June 1987. See Appendix E.

Petitioner was hired by Defendant (HUGHES AIRCRAFT COMPANY) on 2 June 1975 as a salaried employee; petitioner was hired to work in the Support Systems Group, and remained there until the project was concluded in or about September 1976. The petitioner's title per responsibilities was as Automatic Test Engineer (Design Programmer) performing the duties and having the responsibilities of a Member of the Technical Staff (MTS) and classified as a Student Engineer; petitioner's Performance Appraisal Exhibit # 261 indicates that his assigned duties are greater than the classification requirement. The duties would

normally be assigned to an MTS. The petitioner's salary rate was lower than his co-workers but performed equal work as other [MTS] employee's performed, as was indicated in petitioner's Performance Appraisal dated 2/26/76, Exhibit # 261.

When the above project was concluded in the fall of 1976, petitioner transferred to the Electro-Optical and Data Systems Group, located in El Segundo, California. Petitioner joined an engineering department responsible for the automatic test equipment used to test the MK-5 Trident Guidance and Control System. Petitioner's title per responsibilities was application programming engineer [Design and Checkout of Software and Hardware and classified as a student engineer, petitioner's salary rate was much lower than other MTS but performed equal work].

On October 20, 1977, petitioner's manager started to harass him by falsely accusing petitioner of attendance. Mr. Earl Peay and

Mr. Ronald Tong started to falsely to accuse petitioner and warned him in writing (Exhibit # 14). This information was placed in petitioner's personal file. Petitioner informed Mr. Peay and Mr. Tong that this information was false. Petitioner informed the defendants that he was being accused of being late on "SATURDAY" when in-fact petitioner did not work or required to work on Saturday. Petitioner showed the defendants his paycheck stub for the week worked and indicated to each of them that he did not work on Saturday (Exhibit # 239). Defendants did nothing to correct their action, after being shown that they were wrong.

In November 1978, petitioner obtained another position within the Radar Systems Group, in the Engineering Laboratory, responsible for the Radar system for the F-18 Fighter Plane. Petitioner's title per responsibilities was as System Test and evaluation Engineer (F-18 Radar) performing the duties

and having the responsibilities of an MTS and classed as a student engineer. Petitioner's salary rate was much lower than other MTS' but performed equal work as was indicated in petitioner's Performance appraisal dated 3/5/80 (Exhibit # 18).

During the remainder of petitioner's employment with defendants, petitioner worked with the Space and Communication Group, working on the KU-Band Project. This project involved the design, development and testing of a special radar and communications system ultimately used in the NASA Space shuttles. Petitioner's title per responsibilities was as System Engineer (Space Shuttle Rendezvous Radar) performing the duties and classified as a student engineer. Petitioner's Performance Appraisal dated 3/17/81 indicates that petitioner was working at an MTS level with an excellent attitude and sense of responsibility about his work (Exhibit # 266). Petitioner's salary rate was much lower than

other MTS' but performed equal work.

Petitioner continued to work at an MTS level as was indicated by his Performance Appraisal dated 3/10/82 (Exhibit # 50). Petitioner's salary rate was much lower than other MTS' but performed equal work. Defendants rated the petitioner as Superior in Knowledge, Productivity, Creativity, Quality and Judgment (Exhibit # 50). In or about March 21, 1982 petitioner was denied his annual salary increase (Exhibit # 49). In or about March 21, 1983 petitioner was again denied his salary increase (Exhibit #280). Petitioner was given no valid reason for each of such denials; each of the years prior to 1982 and 1983 petitioner had received a salary increase.

Several months prior to petitioner's denial of his March 21, 1982 salary increase there was a managerial and organizational change. After the initial reorganizational change, management was constantly being

changed; first there was Mr. Fred A. Schneider, then Mr. D.H. Sugden and Mr. A.H. Ruysser, then there was Mr. T.W. Tong and Mr. Ed Kulyeshie and Mr. G. Hermann.

During the period commencing after the reorganizational change until the date of petitioner being terminated on June 17, 1983, petitioner was the target of general harassment and discriminatory practices by defendants and each of them. Petitioner received in inter-office-mail a Racist Newspaper Article addressed to him directly (Exhibit # 208). Petitioner did inform the employee relations officer of this racist newspaper article. Defendant Mr. T.W. Tong started to falsely accuse petitioner of poor work habits and being late to work. Petitioner informed Mr. Tong in writing that this was not true (Exhibit # 62). Mr. Tong took no steps to correct his actions and placed this false information in petitioner's personnel file (Exhibit # 62).

On March 15, 1983, petitioner was suspended from work without pay until March 17, 1983 (Exhibit # 68). At the time of suspension the petitioner informed and showed Mr. Tong that this suspension was wrongful. The petitioner showed the defendants that he had been randomly clocking in and out to verify that he was there on time. At the time of the suspension petitioner informed the defendant that Mr. Tong was falsely accusing him of being late to work. Petitioner showed the defendants that on March 9, 1983 Mr. Tong was on "Vacation" himself (Exhibit # 211), a date in which Mr. Tong said petitioner was late to work. Petitioner also showed defendants that Mr. Tong and several other people were changing his time card (Exhibit # 319), to justify petitioner's suspension.

Defendants suspended petitioner willfully, wantingfully, maliciously and with the intention to discriminate against petitioner because of his race. when petitioner

returned to work, he filed a grievance with employee relations (Exhibit # 71). Defendants stated that they would not remove false documents from personnel file (Exhibit # 71).

Prior to petitioner's termination, petitioner made numerous attempts to find an in-house transfer to another unit within the defendants' company (exhibit # 289). The petitioner applied for numerous positions described as open and available within the company. Petitioner was denied each of these positions and was told that he was to hardware oriented (Exhibit # 303), and in another instance because he needed more hardware experience (Exhibit # 294), and in another instance because he was not adaptable to the Space and Communications Group (Exhibit # 287), and in another instance because he had a bad personnel file (Exhibit # 299). Petitioner even applied for a trainee-position and he was denied. After the petitioner's rejection, the position remained open and

employment continued to seek applications from persons of petitioner's qualifications (Exhibit # 227) a trainee position was still available as of June 8, 1983, job code #422602. In point of fact, petitioner had adequate qualifications for each and every job for which he applied for in-house transfer. Petitioner had never had problems transferring from one group to another within defendants' company prior.

Prior to and following petitioner's denial of in-house transfer and being terminated from defendants' company on June 17, 1983, petitioner read in various newspaper advertisements for positions at defendants' company (Exhibit # 315); petitioner was qualified for each and every one of these positions.

After petitioner's termination and the filing of a charge of discrimination with the Equal Employment Opportunity Commission (EEOC) Case # 092831489, the petitioner subpoenaed

his personal file. Petitioner found a document from a Mr. Gerald Hermann to Mr. Tong dated 2/16/83 (Exhibit # 59). The document was referencing times and dates in 1982 in which the petitioner had no knowledge of. Petitioner also found a document from a Mr. Ed Kulyeshie to Mr. Tong, which was dated 2/17/83, one day after Mr. Gerald Hermann's falsified document and referencing dates and times in 1982. Petitioner had no knowledge of these documents. Petitioner showed in court that Mr. Ed Kulyeshie was not even there on days in which he said petitioner was late to work (Exhibit # 60). Petitioner also showed time cards for dates in which Mr. Kulyeshie said petitioner was not there, but in fact Mr. Kulyeshie himself was out on "VACATION" (Exhibits # 210 and 67). Mr. Kulyeshie also requested that the petitioner be terminated from defendants' company (Exhibit # 60, last paragraph). The petitioner also found a document from a Mr. Paul Sterba submitted to Mr.

Tong (Exhibit # 61), submitted on the same day as Mr. Kulyeshie (2/17/83) and one day after Mr. Hermann's (Exhibit # 59). The petitioner had no knowledge of these documents until after his termination. A reading of these documents will illustrate to the court that they were not meant for petitioner to know of. Mr. Hermann's, Mr. Kulyeshie's and Mr. Sterba's documents were all addressed to Mr. Tong (Exhibits # 59, 60, 61 and 67).

Defendants response to the EEOC charge was that one employee was hired into the department one day before petitioner's termination 6/16/83 (Exhibit # 229) and one after petitioner's termination on 6/18/83. Defendants also stated in response to the EEOC complaint that all false information was purged from petitioner's personnel file, when in fact the defendant had already stated in response to petitioner's grievance to the company that nothing would be removed (Exhibit # 71). Petitioner was denied transfer due to

falsified information in petitioner's personnel file. Petitioner had shown defendant that this information was false. The petitioner also showed in court that defendant also prevented petitioner from being rehired back into the department and back into the company (Exhibits # 102 and 83). Petitioner also showed that a white employee was not denied the right to be rehired back into the company. The petitioner also verified during trial that no one else was harassed for time and attendance from a Mr. Tong, Mr. Kulyeshie and Mr. Sugden. The petitioner was the only one in which defendants harassed and inflicted disparate treatment and disparate impact. The petitioner also verified in court that there is a difference in a Student engineering salary and an MTS, from a Mrs. Harrell, Mr. Tong and Mr. Kendall. The defendants failed to pay petitioner equal salary for comparable work which other MTS employees in comparable positions were earning. See petitioner's

Petition for Rehearing at Appendix F.

On August 15, 1983, the petitioner obtained another engineering position with a local major Aerospace firm and was paid equal pay for equal work. Petitioner has been given a salary raise for each and every year in which he has been employed, since his termination from HUGHES AIRCRAFT COMPANY on June 17, 1983.

REASONS FOR GRANTING WRIT

The Supreme Court has set forth the criteria for the resolution of an individual's disparate treatment, disparate impact claim under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e-2000e-17, providing for injunctive and other relief against discrimination in employment, and the Civil Rights Act of 1866, 42 U.S.C. § 1981, providing for equal rights of persons in every state and territory within the jurisdiction of the United States to make and enter into contract, alleging employment discrimination because of race or color, and under the Equal Pay Act, equal pay for equal work of the Fair Labor Standards Act of 1938, §§ 1 et seq.; 6(D) as amended 29 U.S.C.A. §§ 201 et seq.; 206(d); Civil Rights Act of 1964, § 703(a) (1) as amended 42 U.S.C.A. § 2000e-2(a) (1).

DISCRIMINATORY TERMINATION

Under the McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817 (1973) in the discriminatory discharge context, the plaintiff must show (i) that he was within the protected class; (ii) that he was doing his job well enough to rule out the possibility that he was fired for inadequate job performance; and (iii) that his employer sought a replacement with qualifications similar to his own.

The plaintiff showed in the district court that he is within the protected class (Exhibit # 202). The plaintiff also established a prima facie that he was a satisfactory employee and the defendants articulated reason was only a pretextual. The defendants articulated reason was that the plaintiff was not adequately performing his job duties and had a long history of serious attendance problems.

The plaintiff has showed a pattern of the

defendants to fabricate and falsify the plaintiff's records. Going back to October 20, 1977, Mr. R. Tong and Mr. E. Peay fabricated and falsified the plaintiff's records by saying the plaintiff was late to work on various days (Exhibit # 14). The plaintiff informed the defendants that this was wrong. The plaintiff even showed the defendants that they were writing him up for being late on "SATURDAY", 10/15/77. The plaintiff even showed the defendants his pay check stub (Exhibit # 239) for the week worked and indicated to each of them that he did not work on Saturday or there would be overtime shown for the week ending. Defendants did nothing to correct their action after being shown they were wrong. The defendants used Exhibit # 14 as a pretext to falsify and justify the plaintiff's performance appraisal (Exhibits # 35 and 36), reported by Mr. E. Peay and Mr. R. Tong, dated October 1977 and reported by Mr. Cardella and Mr. Lemestre, dated March 1977.

The plaintiff showed a corroboration of falsified and fabricated documents used by the defendants as a pretext to discriminate and terminate the plaintiff. The plaintiff's performance appraisal for the year 1976 indicated that the plaintiff was working at an MTS level (Exhibit # 261). The plaintiff proved a prima facie case of disparate treatment by establishing proof of material facts supporting and inference of intentional discrimination to fabricate and falsify the plaintiff's records and to justify a poor performance appraisal. Under Furnco Construction Corp. v. Waters, 438 U.S. 567, 577, 98 S.Ct. 2943, 2950, 57 L.Ed.2d 957 (1978) the burden of production has been met upon a showing of actions taken by the employer from which one can infer, if such actions remain unexplained. That it is more likely than not that such action was based upon race or another impermissible criterion.

The defendants use the pretext that Mr.

Chin completed a performance appraisal of the plaintiff (Exhibit # 19). Exhibit # 19 is not a performance appraisal. The plaintiff's performance appraisal for 1980 is shown as Exhibit # 18. Plaintiff's performance appraisal dated 3/5/80 states that he was performing the duties and having the responsibilities of an MTS. Defendants' Exhibit # 19 was an employee-supervisor communication exchange, which was the supervisor's input. The plaintiff (employee's) input is shown as Exhibit # 20. Exhibit # 20 supports the plaintiff's performance of Exhibit # 18. Mr. Chin's input was a pretext to discriminate and terminate.

The defendants use the pretext that Mr. Sugden completed a warning of attendance. In the District Court the defendant Mr. Sugden stated that he did not record this attendance. The plaintiff also indicated in Court that he never saw Exhibit # 46. The defendant used Exhibit # 46 as a pretext to discriminate and

terminate the plaintiff. The plaintiff proved a prima facie disparate treatment, disparate impact when plaintiff cross-examined Mr. Sugden and asked if he had written any one else up like me, the ANSWER WAS NO. Under the International Brotherhood of Teamsters v. United States, 431 U.S. 324, 349, 97 S.Ct. 1843, 1861, 52 L.Ed.2d 396 (1977) the theory of liability is that an individual was singled out and treated less favorable than other similarly situated on account of race or any other criterion impermissible under the statute.

The defendants use the pretext that Mr. Ruysser completed a performance appraisal of the plaintiff (Exhibit # 21). Exhibit # 21 is not a performance appraisal, the plaintiff's performance appraisal for 1981 is shown as Exhibit # 266. The plaintiff's performance appraisal dated 3/17/81 indicates that the plaintiff was working at an MTS level with an excellent attitude and sense of responsibility

about his work. Defendants' Exhibit # 21 was an employee-supervisor communication exchange, which was the supervisor's input. The plaintiff's (employee's) input is shown as Exhibit 47 and supports the plaintiff's performance appraisal dated 3/17/81. Mr. Ruysser's input Exhibit # 21 and Mr. Sugden Exhibit # 46 was a pretext to discriminate and terminate the plaintiff. the plaintiff was never aware of Exhibit # 46 until after his termination. Mr. Sugden himself stated in the district court that Mr. Ruysser was not even qualified to determine if an employee's work was right or wrong. The plaintiff's performance appraisal dated 3/10/82 states that Berry'an (plaintiff) was superior in Knowledge, Productivity, Creativity, Quality and Judgment, signed by Mr. Sugden and Mr. T. Tong (Exhibit # 50).

The defendant Mr. T. Tong used the same pattern of fabricating and falsifying the plaintiff's records to create a pretext to discriminate and terminate the plaintiff. Mr.

T. Tong suspended the plaintiff on March 14, 1983 (Exhibit # 68). The plaintiff informed Mr. Tong that this suspension was wrong. The plaintiff showed the Court that on March 9, 1983 Mr. Tong was on "VACATION" (Exhibit # 211), a date in which Mr. Tong said the plaintiff was late to work. The plaintiff showed to the Court that Mr. Tong and several other people were changing the plaintiff's time card (Exhibit # 319). This was all done to justify the plaintiff's suspension. After changing the plaintiff's time card, the defendants then issued a new card (Exhibit # 323). The plaintiff even showed the defendants that he was randomly clocking in and out for the period the defendants said the plaintiff was suspended for (Exhibit # 213). The defendants suspended the plaintiff willfully, wantingfully, maliciously and with the intention to discriminate against the plaintiff because of his race. The defendats' used the pretext that the plaintiff misstated his time card.

The plaintiff had no need to falsify his time card to show that Mr. Tong was suspending him wrongfully. The plaintiff showed in the District Court that Mr. Tong was out on vacation when he said the plaintiff was late to work and that Mr. Tong and several others corroborated in changing his time card to justify plaintiff's suspension. The plaintiff proved a prima facie disparate treatment and disparate impact when plaintiff cross-examined Mr. Tong and asked, did you suspend any one else like me, THE ANSWER WAS NO. The defendant suspended the plaintiff only as a pretext to terminate; Furnco, supra, 438 U.S. at 576, 98 S.Ct. at 2949.

The defendant Mr. Gerald Hermann uses the pretext that the plaintiff was late to work on days in the summer of 1982 and dated the document 2/16/83 (Exhibit # 59). Mr. Hermann submitted this document to Mr. Tong without plaintiff's knowledge thereof on 2/16/83 and referencing times and dates for the summer of

1982 with no showing of plaintiff's knowledge thereof. The company policies and operating procedure is that any and all adverse information placed in employee's personnel file be documented and shown to the employee and signed by employee (Exhibit # 205). The plaintiff established a prima facie disparate impact under Grigg v. Duke Power Co., 401 U.S. 424, 431, 91 S.Ct. 849, 853, 28 L.Ed.2d 158 (1971). A prima facie disparate impact case under Title VII may be established without any proof of intentional discrimination; where business practice, neutral on its face, is shown to have a substantial adverse impact on some group protected by Title VII, the plaintiff has made out a prima facie and rebuts the defendants pretext. Defendant Mr. Hermann placed false documents in plaintiff's personnel file without plaintiff's knowledge thereof (Exhibit # 59), Grigg v. Duke Power Co., supra.

The defendant Mr. Kulyeshie placed

falsified documents in the plaintiff's personnel file without plaintiff's knowledge thereof (Exhibits # 60 and 67). Mr. Kulyeshie submitted Exhibit # 60 to Mr. Tong without plaintiff's knowledge thereof on 2/17/83, one day after Mr. Hermann submitted Exhibit # 59 to Mr. Tong falsifying plaintiff's personnel record. Here again, the defendant is referencing times and dates during the summer of 1982 with no showing of plaintiff's knowledge thereof (Exhibit # 60). The defendant Mr. Kulyeshie went so far as to recommend David Berry'an's dismissal from work at HUGHES AIRCRAFT (Exhibit # 60, last paragraph). Mr. Sterba submitted Exhibit # 61 on 2/17/83 to Mr. Tong on the same day as Mr. Kulyeshie and one day after Mr. Hermann's Exhibit # 59. Exhibit # 67 shows that Mr. Kulyeshie was out on "VACATION" on days he said the plaintiff was late to work (Exhibits # 210 and 67). The plaintiff proved a prima facie disparate treatment and disparate impact when plaintiff

cross-examined Mr. Kulyeshie and asked if he had written any one else up like me, THE ANSWER WAS NO. Teamsters, supra; Grigg v. Duke Power Co., supra; and Furco, supra. Mr. Hermann, Mr. Kulyeshie and Mr. Sterba corroborated and falsified plaintiff's records which caused the plaintiff to be rejected for positions he applied for and eventually terminated from work. Teamsters, supra; Grigg, supra; and Furco, supra.

The plaintiff established a prima facie when the plaintiff showed the District Court that one employee was hired into the department a day before plaintiff's termination on 6/16/83 (Exhibit # 229) and one after plaintiff's termination on 6/18/83. The defendant uses the articulated reason that one was hired to work at another HUGHES facility; NO WAY!!! Each department at HUGHES hires their own people. The other pretext was that the other was a long-term Ku-Band employee. The plaintiff showed the District court that the

employee hired was transferred into the department (Exhibit # 229). The defendants' articulated reason was only a pretext.

Under McDonnell Douglas, supra, "If the employer sought a replacement with qualifications similar to his own, thus demonstrating a continued need for the same service and skills". The plaintiff established a prima facie and rebuts the defendants' pretext. The defendants also stated to the EEOC that all fabricated and falsified information was purged from the plaintiff's personnel file (Exhibits # 71 and 229), when in fact the defendants had already stated to the company that nothing would be removed (Exhibit # 71). The plaintiff has shown through a preponderance of the evidence and statistical data produced, a clear pattern of intentional discrimination. The defendants articulated reason was only pretextual and now rebutted. Civil Rights Act of 1964, § 701 et seq.; 42 U.S.C.A. § 2000 et seq.; 42 U.S.C.A. § 1981.

DISCRIMINATORY TRANSFER

Under McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817 (1973), and Teamsters, supra, the plaintiff in Title VII trial must carry the initial burden under the statute of establishing a prima facie of racial discrimination. The plaintiff has shown: (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected, and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of plaintiff's qualifications.

The plaintiff showed in the District Court that he is a minority (Exhibit # 202). The plaintiff established a prima facie case when he applied for numerous positions within defendants' company (Exhibit # 299); reason for rejection; upon examination of personnel folder a long-term and repeated history of

lateness, leave without permission, absence was noted. He had been reprimanded and little change in attitude/behavior noted. (Exhibit # 287); reason for rejection; David has been requested to look for more suitable work by the other department manager (Mr. Tong) in this laboratory. It is the general consensus that he is not adaptable to Space and Communication System Text, the plaintiff was qualified for this position. The plaintiff was rejected due to discrimination. (Exhibit # 303); reason for rejection: all hardware oriented. (Exhibit # 294); reason for rejection: need more hardware experience. (Exhibits # 289 and 290); reason for rejection: personnel records do not support requirements for job. Plaintiff was applying for a trainee position and rejected. Despite plaintiff's qualifications, plaintiff was rejected for each of these positions. After plaintiff's rejection of Exhibit # 289, job announcement remained open and the employer continued to

seek applications from persons of plaintiff's qualifications. Exhibit # 289 was applied for on 9/29/82 and 4/27/83 position remained open until at least June 8, 1983 (Exhibits # 289 and 290).

The plaintiff proved his prima facie case under McDonnel, supra; and Teamsters, supra, and rebuts the defendants' pretext of termination for unsatisfactory workmanship. The defendants' pretext was based on fabrication and falsification of the plaintiff's records. The plaintiff proved his prima facie of disparate treatment and disparate impact.

DISCRIMINATORY PAY

The Equal Pay Act Standards apply in Title VII suits when plaintiff raises a claim of Equal Pay; Fair Labor Standards Act of 1938, §§ 1 et seq.; (6d) as amended 29 U.S.C.A. §§ 201 et seq.; 206(d); Civil Rights Act of 1964, 703(a)(1) as amended 42 U.S.C.A. § 2000e-2(a)(1). The plaintiff proved a prima facie violation of Equal Pay Act. The plaintiff showed the District Court that his actual performance and content, not job titles, classification or description, was at a higher level MTS than paid (Exhibits # 261, 18, 266, 50 and 74). The plaintiff also verified in court that there is a difference in a student engineer's salary and an MTS, from a Mrs. Harrell, Mr. Tong and Mr. Kendall. The plaintiff was classified as a student engineer and performing the task of an MTS actual job performance and content; Gunther v. County of Washington, 623 F.2d 1303 (9th Cir. 1979) (aff'd), 452 U.S. 161, 101 S.Ct. 2242 (1982).

The defendants' reason for not paying the plaintiff Equal Pay was only pretextual. The plaintiff proved a prima facie when he showed the court that he was passed up for his salary raise in the year 1982 and 1983 (Exhibits # 49 and 280). The plaintiff has a showing that links their conduct with the employer's action. The defendants' reason was only a pretext. Civil Rights Act of 1964, § 701 et seq.; 42 U.S.C.A. § 2000e et seq.; 42 U.S.C.A. § 1981.

DISCRIMINATORY HARASSMENT

The plaintiff proved a prima facie case of harassment through a preponderance of the evidence that when Mr. Tong suspended the plaintiff wrongfully, the defendant knew in advance that plaintiff had done no wrong (Exhibit # 68). After the termination of plaintiff the defendants recommended to the company that the plaintiff is NOT to be rehired back into the company (Exhibit # 83). The defendant did not recommend in precluding white employees from being rehired back into the company' prima facie established. The defendants' reason was only pretextual; Teamsters, supra. The plaintiff proved a prima facie violation of Title VII when Mr. Tong, Mr. Hermann, Mr. Kulyeshie, Mr. Chin, Mr. Sugden and Mr. Ruysser falsely accused the plaintiff of time and attendance. Plaintiff proved a prima facie of harassment when Mr. Ruysser was appointed supervisor, knowing that he was not qualified to be supervisor, but only placed in the position to

harass the plaintiff, court Record. The plaintiff showed that defendants Mr. Sugden, Mr. Tong and Mr. Kulyeshie did not falsify any one else's records but the plaintiff's, court records. The plaintiff has made out a prima facie of disparate treatment and disparate impact; Teamsters, supra.

The ultimate establishment of prima facie employment discrimination has been proven through a preponderance of evidence that plaintiff was not promoted or dismissed under conditions which, more likely than not, were based upon impermissible racial considerations. Plaintiff has shown that the incidents of harassment have shown long patterns of creating or condoning an environment at the work place which significantly and adversely affects the psychological well-being of plaintiff because of his race; McDonnell, supra.

The plaintiff has shown more than a few isolated incidents of harassment having

occurred to establish a violation of Title VII claims. 42 U.S.C.A. § 1981, Civil Rights Act of 1866, Civil Rights Act of 1964, § 701 et seq.; 718, as amended, 42 U.S.C.A. 2000e et seq.; 2000e-17.

CONCLUSION

For the foregoing reasons, petitioner David Berry'an respectfully requests that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DAVID BERRY'AN, Plaintiff-Appellant, v. HUGHES AIRCRAFT COMPANY, a corporation, THOMAS W. TONG, an individual, A.H. RUYSSER, an individual, EDWARD KULYESHIE, an individual, GERALD HERMANN, an individual, and Does 1 through 10, Defendants-Appellees.	)	No. 86-5521 DC No. CV 84-6158-WDK M E M O R A N D U M*

Appeal from the United States District Court
for the Central District of California
Honorable William D. Keller,
District Judge Presiding

Submitted: December 12, 1986 -
San Francisco, California**
Filed: March 19, 1987

Before: BARNES, SKOPIL and CANBY, Circuit Judges.

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 21.

** The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a) and 9th Cir. Rule 3(f).

The district court's judgment is affirmed. Barry'an failed to establish the ultimate issue of discrimination with respect to all or any of this Title VII claims and, therefore, the district court's judgment was not clearly erroneous. See Castillas v. United States Navy, 735 F.2d 338, 343-44 (9th Cir. 1984). Moreover, this action was based on frivolous grounds and, therefore, the district court did not abuse its discretion in awarding Hughes attorney fees. See Mitchell v. Los Angeles County Superintendent of Schools, 805 F.2d 844, 847-48 (9th Cir. 1986).

Berry'an was hired by Hughes Aircraft Company ("Hughes") on June 2, 1975 and worked for four divisions within Hughes before his termination. At the time Berry'an was hired, he made misrepresentations about his academic credentials. While employed at Hughes, Berry'an received verbal and written warnings

about his attendance and work habits.[1] He was warned that he would be terminated if he did not improve his allegedly poor work habits.

On September 22, 1982, Berry'an was asked to seek alternative employment within or outside Hughes. thereafter, he applied for employment in other departments within Hughes and also for employment outside Hughes. Hughes did not transfer him to another department. While seeking another job, Berry'an applied for jobs beyond his qualifications.

On March 14, 1983, Berry'an was suspended for three days without pay for continued failure to correct his allegedly poor work

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[1] Berry'an was warned to correct his deficient work habits as follows: appraisal report by Cardella and Lemestre, March 1977; appraisal report by Peay, October 1977; appraisal report by Chin, September 1980; written warning by Sugden, August 1981; appraisal report by Ruysser, September 1981; appraisal report by Tong, July 1982, Memorandum to Tong by Sterva, February 1983, written warning by Tong, February 1983.

habits. Berry'an filed a complaint with Hughes and after an investigation, a Hughes Employee Relations Representative concluded that his suspension for poor attendance was justified. Thereafter, Hughes' management decided to discharge Berry'an if he did not find alternative employment before June 17, 1983.

Several weeks after his suspension, Berry'an received an allegedly derogatory newspaper excerpt through Hughes' inter-office mail.

From 1976 to 1982, Berry'an received an annual weekly salary increase. His salary increase averaged approximately ten percent each year. In May 1982, Berry'an was promoted and awarded a special salary increase of twenty-six percent.

Hughes discharged Berry'an on June 17, 1983. He filed a charge id discrimination with the Equal Employment Opportunity Commission (EEOC) in July 1983. In June 1984,

the EEOC issued Berry'an a right to sue letter. On August 8, 1984, Berry'an filed a pro se complaint against Hughes. After a bench trial, the district court granted judgment for Hughes, and adopted Hughes' proposed findings of fact and conclusions of law. On February 21, 1986, the district court granted Hughes' motion for $10,000 in attorney fees. Berry'an timely appeals.

There are two issues before this court:

1. Did the district court clearly err in failing to find that Hughes racially discriminated against Berry'an?

2. Did the district court abuse its discretion in awarding Hughes attorney fees?

On each issue we hold there was no error.

I

Discrimination Claims

A. Standard of Review

Since this case was fully tried, we review the district court's factual findings as to Title VII discrimination under the clearly erroneous standard. Casillas, 735 F.2d at 342. Appellate review focuses not upon whether the prima facie case was established but upon the ultimate questions of discrimination. Id. at 343-344. The ultimate burden of proof, despite the shift in the burden of production, remains with the employee. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981).

B. Termination

Berry'an contends that he was terminated because of his race and that he has established the prima facie requirements for discriminatory discharge. He states that he is a member of the black race. He argues he was a satisfactory employee when discharged

and that he was replaced by a white worker. Moreover, Berry'an asserts that Hughes fabricated evidence of tardy attendance and deficient work habits.

To establish a prima facie case of discriminatory discharge, Berry'an must prove that he belongs to a racial minority, that he was performing satisfactorily when he was terminated, and that Hughes sought a replacement with qualifications similar to his own. Sengupta v. Morrison-Knudsen Co., Inc., 804 F.2d 1072, 1075 (9th Cir. 1986).

The district court properly found that Berry'an was neither performing satisfactorily nor replaced. Other than his own testimony, Berry'an offered no evidence that Hughes falsely altered his records. Hughes' personnel file on Berry'an chronicled the numerous warnings he received concerning his deficient work habits. In addition, Berry'an misstated his time cards and had difficulty working with others. Moreover, Hughes did not attempt to

replace Berry'an. Thus, Berry'an did not satisfy the requirements for establishing discriminatory termination. See id.

C. Transfer

Berry'an contends that he applied for numerous positions within Hughes but was denied a transfer because of his race. He states that he was qualified for the positions for which he applied. In addition, Berry'an states that Hughes, after refusing his application, continued to seek applications from persons with his same qualifications.

To establish a prima facie case of discrimination, Berry'an was required to show that he belongs to a racial minority, that he applied for a position for which he was qualified, that he was rejected, and that thereafter the position remained open and Hughes continued to seek applicants with qualifications similar to his own. Mitchell, 805 F.2d at 846 (citing McDonnell Douglas v. Green, 411 U.S. 792, 802 (1973).

Alternatively, Berry'an may establish a prima facie case by offering evidence that creates an inference that Hughes based its employment decision on discriminatory criteria. Id. (citing Teamsters v. United States, 431 U.S. 324, 358 (1977). Once Berry'an establishes a prima facie case, Hughes's burden is to articulate a legitimate nondiscriminatory reason for rejecting Berry'an. Id. Then Berry'an must prove that Hughes' articulated reason was a pretext. Id. (citing McDonnell Douglas, 411 U.S. at 807).

The district court properly found that Hughes did not deny Berry'an a transfer position because of his race. The record reveals that Berry'an either was not qualified for the positions for which he applied or that the positions were closed. Moreover, even if he had established a prima face case, Hughes' articulated reason for not selecting Berry'an was not pretext because Berry'an was an unsatisfactory employee.

D. Equal Pay

Berry'an alleges that salary decisions made by Hughes in 1982 and 1983 were based on race. He also states that he performed tasks at a level higher than that for which he was paid.

In his wage discrimination claim, however, Berry'an failed to establish the ultimate issue of race discrimination. See EEOC v. Inland Marine Industries, 729 F.2d 1229, 1234 (9th Cir.), cert. denied, 469 U.S. 855 (1984). Even though his assigned duties were greater than his classification requirements, Hughes awarded Berry'an lower salary increases because he was not dependable, not punctual, and maintained generally poor work habits.

E. Harassment

Berry'an contends he suffered a continuing and extensive course of harassment of which Hughes was area and failed to take reasonable steps to remedy. He alleges that

he was harassed because: (1) he received a derogatory newspaper excerpt; (2) he was suspended; and (3) his supervisor recommended that he not be rehired. He also argues that he was continually harassed regarding his work habits.

To succeed on a claim of discriminatory harassment, Berry'an must prove that he was subjected to a continuing and extensive course of harassment, and that Hughes failed to take reasonable steps to remedy the harassment. Silver v. KCA, Inc., 586 F.2d 138, 141-42 (9th Cir. 1978).

Except for his own testimony, Berry'an has offered no evidence that Hughes falsely accused him of maintaining deficient work habits. Hughes, however, presented testimony of numerous witnesses supporting the allegation that Berry'an maintained poor work habits. In addition, after conducting an investigation an employee representative found Berry'an's suspension justified. therefore,

the suspension and recommend;ation do not show that Berry'an was harassed. Moreover, although Berry'an received a derogatory newspaper excerpt through Hughes' interoffice mail, he concedes that he received no other derogatory documents and that he heard no derogatory remarks while employed by Hughes. Thus, because Berry'an was not subject to extensive or continuous harassment, he has not established a claim for harassment.

II

Attorney Fees

The award of attorney fees falls within the discretion of the trial court and will not be disturbed absent an abuse of discretion. Mitchell, 805 F.2d at 846.

In requesting attorney fees on appeal, Berry'an implicitly argues that Hughes was not entitled to attorney fees below.[2]

Attorney fees may be awarded against a plaintiff in a Title VII case where the district court finds the claim "frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so." Christianburg Garment Co.

[2] Berry'an argues that he is entitled to attorney fees on appeal because he has established various Title VII and 42 U.S.C. § 1981 violations. As previously discussed, however, Berry'an has failed to establish the ultimate issue of discrimination, and therefore, because he is not a prevailing party he is not entitled to attorney fees on appeal. 42 U.S.C. § 2000e-5(k). Hughes does not seek attorney fees at this time but states that if it prevails on appeal it may seek fees pursuant to 42 U.S.C. § 2000e-5(k).1.

v. EEOC, 434 U.S. 412, 422 (1978); Mitchell, 805 F.2d at 847-48.

Here the district court properly awarded Hughes attorney fees. Berry'an based his action on frivolous grounds and misrepresentations. He misrepresented his qualifications and credentials, and misstated his time cards. Since this action resulted in the needless expenditure of litigation expenses, the district court did not abuse its discretion in awarding Hughes attorney fees. See id.

The district court's judgment is AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DAVID BERRY'AN, Plaintiff-Appellant, v. HUGHES AIRCRAFT COMPANY, a corporation, THOMAS W. TONG, an individual, A.H. RUYSSER, an individual, EDWARD KULYESHIE, an individual, GERALD HERMANN, an individual, and Does 1 through 10, Defendants-Appellees.	)	No. 86-5521 DC No. CV 84-6158-WDK O R D E R

Before: BARNES, SKOPIL and CANBY, Circuit Judges.

Appellant's petition for rehearing is DENIED.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

DAVID BERRY'AN, Plaintiff, v. HUGHES AIRCRAFT COMPANY, a corporation, Defendant.	NO. CV 84-6158-WDK JUDGMENT

This action came on for trial before the Court, the Honorable William D. Keller, District Judge, presiding, and the issues having been duly tried and a decision having been duly rendered,

IT IS ORDERED, ADJUDGED AND DECREED:

1. That Plaintiff shall take nothing by his action against Defendant.

DATED: December 4, 1985.

(-)

William D. Keller, Judge
United States District Court

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DAVID BERRY'AN,	)	No. 86-5521
	)	
Plaintiff-Appellant,	)	DC CV-84-6158-WDK
	)	
vs.	)	ORDER
	)	
HUGHES AIRCRAFT CO., et al.,	)	
	)	
Defendants-Appellees.	)	

Appellant's motion of May 27, 1986, for leave to file the opening brief late is granted. The brief already received will be filed.

This order is subject to reconsideration by a judge if any opposition is filed within ten (10) days of the entry of the order.

For the Court:

(-)

Grant L. Kim
Motions Attorney/Deputy Clerk
Local Rule 22

MA 9/3/86

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DAVID BERRY'AN, Plaintiff-Appellant, v. HUGHES AIRCRAFT COMPANY, a corporation, THOMAS W. TONG, an individual, A.H. RUYSSER, an individual, EDWARD KULYESHIE, an individual, GERALD HERMANN, an individual, and Does 1 through 10, Defendants-Appellees.	)	No. 86-5521 DC No. CV 84-6158-WDK O R D E R

Before: BARNES, Circuit Judge.

Appellant's motion for stay of mandate is GRANTED.

No. 86-5521

UNITED STATES COURT OF APPEALS

NINTH CIRCUIT

DAVID BERRY'AN, an individual, Plaintiff-Appellant, vs. HUGHES AIRCRAFT COMPANY, a corporation, Thomas W. Tong, an individual, A.H. Ruysser, an individual, Edward Kulyeshie, an D.M. Sugden, an individual, Gerald Hermann, an individual, and Does 1 through 10, inclusive, Defendants-Appellees.	No. 86-5521 DC# CV-84-6158-WDK Central California PLAINTIFF-APPELLANT PETITION FOR REHEARING

On Appeal From the Central District
of California
NINTH CIRCUIT

DAVID BERRY'AN
606 Levering Ave. #216
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Plaintiff
In Propria Personae

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April 2, 1987

In the Opinion Of The Petitioner The Court Has Misapprehended The Following Material Facts And Conclusions Of Law, In Finding That Hughes Did Not Discriminate Against Plaintiff Because Of His Race.

1. Hughes Did Terminate Plaintiff Because Of His Race

The Plaintiff contends that he suffered Disparate Treatment and disparate Impact by terminating him on June 17, 1983, because of his race. The Defendants (Hughes) articulated reason was only a pretextual.

The Ninth Circuit Has held that the criteria set forth by the Supreme Court for the resolution of and individual Disparate Treatment, Desparate Impact claim under Title VII also apply to section 1981, Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e-2000e-17, providing for injunctive and other relief against discrimination in employment, and the Civil Rights Act of 1866, 42 U.S.C. § 1981.

The plaintiff did succeed in establishing a prima facie Disparate Treatment claim on his 1981 claim, and that the defendants articulated reason was only a pretextual.

Under Sengupta v. Morrison-Knudsen Co., Inc., 804 F.2d 1072, 1075 (9th Cir. 1986) (citing McDonnell Douglas v. Green, 411 U.S. 792, 802n. 13, 93 S.Ct. at 1824 n. 13 (1973)). In the discriminatory discharge context, the plaintiff must show (i) that he was within the protected class; (ii) that he was doing his job well enough to rule out the possibility that he was fired for inadequate job performance; and (iii) that his employer sought a replacement with qualifications similar to his own.

The plaintiff showed in the district court that he is within the protected class (Brief for Plaintiff-Appellant at 14(3) Appendix #I, Exhibit 202). The plaintiff also establish a prima facie that he was a satis-

factory employee and the defendants articulated reason was only a pretextual. The defendants articulated reason was that the plaintiff was not adequately performing his job duties and had a long history of serious attendance problems. The plaintiff asserts that the following material facts have been overlooked.

The plaintiff showed a pattern of the defendant to fabricate and falsify the plaintiffs records. Going back to October 20, 1977, Mr. R. Tong and Mr. E. Peay fabricated and falsified the plaintiffs record by saying the plaintiff was late to work on various days (RT 71 (23)-72 (1)) (Brief for Plaintiff-Appellant At Appendix #V, Exhibit 14). the plaintiff informed the defendants that his was wrong (RT 72 (5). The plaintiff even showed the defendants that they were writing him up for being late on "SATURDAY" (10/15/77) (RT 73 (7)-(16)). The plaintiff even showed the defendants his pay check stub

(RT 73 (17)-(25)) (Brief for Plaintiff-Appellant at Appendix #VI, Exhibit 239), for the week worked and indicated to each of them that he did not work saturday or there would be overtime shown for that week ending. Defendants did nothing to correct there action, after being shown they were wrong. The defendants uses Exhibit 14 as a pretextual to Falsify and justifie the plaintiffs performance appraisal (RT 277) (13) Exhibit 35, 36) reported by Mr. E. Peay and Mr. R. Fong dated October 1977 and reported by Cardella and Lemestre dated March 1977. the plaintiff has shown a corrobration of falsified and fabricated documents used by the defendants as a pretext to discriminate and terminate the plaintiff. The plaintiffs performance appraisal for the year 1976 indicated That the plaintiff was working at and (MTS) Level (RT 36 (7)-(13)), (Brief for Plaintiff-Appellant at Appendix #VIII, Exhibit 261). The plaintiff prove a prima facie case of disparate

treatment by establishing proof of Material facts supporting an inference of intentional discrimination to fabracte and falsifie the plaintiffs record and to justifie a poor performance appraisal. Under Furnco Construction Corp. v. Waters 438 U.S. 567, 577, 98 S.Ct. 2943, 2950, 57 L.Ed.2d 957 (1978), Sengupta v. Morrison-Knudsen Co. Inc. Supra; The burden of production has been met upon a showing of actions taken by the employer from which one can infer, if such actions remain unexplained. That it is more likely than not that such action was based upon race or another impermissible criterion.

The defendants uses the pretext that Mr. Chin completed a performance appraisal of the plaintiff (RT 346 (11) Exhibit 19). Exhibit 19 is not a performance appraisal, the plaintiffs performance appraisal for 1980 is shown as Exhibit 18 (Brief for Plaintiff-Appellant at Appendix VIII Exhibit 18) (RT 74 (23). Plaintiff performance appraisal dated

3/5/80 states that he was performing the duties and having the responsibilities of a member of the technical staff (MTS) (RT 75 (1)-(25)). Defendants Exhibit 19 was and Employee-Supervisor Communication exchange, which was the supervisors input. The plaintiff (Employee's) input is shown in (Brief for Plaintiff-Appellant at Appendix IX Exhibit 20). Exhibit 20 supports the plaintiffs performance appraisal of exhibit 18. Mr. Chin input was a pretext to discriminate and terminate.

The Defendants uses the pretext that Mr. Sugden completed a warning of attendance. In district court the defendant (Mr. Sugden) stated that he did not record this attendance (RT 476 (8)). The plaintiff also indicated in court that he never saw exhibit 46 (RT 308 (16)-24). The defendant used exhibit 46 as a pretext to discriminate and terminate the plaintiff. The plaintiff had no knowledge of this exhibit 46. The plaintiff proved a prima

facie disparate treatment disparate impact when plaintiff cross examine Mr. Sugden and ask if he had written any one else up like me, The answer was NO. (RT483 (11)-(14)). Under International Brotherhood of Teamsters v. United States, 431 U.S. 324, 349, 97 S.Ct. 1843, 1861, 52 L.Ed.2d 396 (1977). The Theory of liability is that an individual was singled out and treated less favorable than other similary situated on account of race or any other creterion permissible under the statue.

The defendants uses the pretext that Mr. Ruysser completed a performance appraisal of the plaintiff (RT 494 (16) exhibit 21). Exhibit 21 is not a performance appraisal. The plaintiff performance appraisal for 1981 is shown in (Brief for Plaintiff-Appellant at Appendix VIII, Exhibit 266). The plaintiffs Performance appraisal dated 3/17/81 indicates that plaintiff was working at and (MTS) level with and excellent attitude and sense of responsibility about his work (RT 37(7)).

Defendants exhibit 21 was and employee-supervisor communication exchange, and exhibit 21 was the supervisors input. The plaintiff (employee) input is shown in (Brief for Plaintiff-Appellant at Appendix IX, Exhibit 47). Exhibit 47 supports the plaintiffs performance appraisal dated 3/17/81. Mr. Ruyssers input exhibit 21 and Mr. Sugden exhibit 46 was a pretext to discriminate and terminate the plaintiff. The plaintiff was never aware of exhibit 46 until after his termination (RT 308 (21)-(24) exhibit 46). Mr. Sugden himself stated that Mr. Sugden himself stated that Mr. Ruysser was not even qualified to determine if and employee"s work was right or wrong (RT 480 (6) -(8). The plaintiff performance appraisal dated 3/10/82 states that Berry'an was superior in knowledge, productivity, creativity, quality and judgement, sign by Mr. Sugden and Mr. T. Tong (RT 37 (15)-(25) Exhibit 50), (RT 563 (14)-(25) Exhibit 50), (Brief for Plaintiff

Appellant at Appendix VIII, Exhibit 50).

The defendant Mr. T. Tong used the same pattern of fabracating and falsifing the plaintiffs record to create a pretext to discriminate and terminate the plaintiff. Mr. Tong suspended the plaintiff on March 14, 1983 (RT39) (1) Exhibit 68), (Brief for Plaintiff-Appellant at Appendix VII, Exhibit 68). The plaintiff informed Mr. Tong that this suspention was wrong. The plaintiff showed the Court that on March 9, 1983 that Mr. Tong was on "Vacation" (RT 49 (1) - (25) Exhibit 211), (Brief for Plaintiff-Appellant at Appendix VII, Exhibit 211), a date in which Mr. Tong said the plaintiff was late to work. The plaintiff showed to the Court that Mr. Tong and several other people were changing the plaintiffs time card (RT 548 thru 551, Exhibit 319), (Brief for Plaintiff-Appellant at Appendix VII, Exhibit 319), this was all done to justifie the plaintiffs suspension. After changing the plaintiff time card the

defendants then issued a new time card (RT 551 (8)-(25), 552 (1)-(25), 608 (1)-(17) Exhibit 323), (Brief for Plaintiff-Appelalnt at Appendix VII, Exhibit 323). The defendants suspended plaintiff willfully, wantingfully, and maliciously and with the intention to discriminate against the plaintiff because of his race. The defendants used the pretextual that the plaintiff mistated his time card. The plaintiff had no need to falsified his time card to show that Mr. Tong was suspending him wrongfully. The plaintiff showed in the district court that Mr. Tong was out on vacation when he said the plaintiff was late to work and that Mr. Tong and several others corrobrated in changing his time card to justified plaintiff suspension. The plaintiff proved a prima facie disparate treatment and disparate impact when plaintiff cross examine Mr. Tong and ask, did you suspend any one else like me (RT 568 (3)) the answer was NO. The defendants suspended the plaintiff only as a

pretext to terminate. Furnco, Supra; 438 U.S.; at 576, 98 S. Ct. at 2949.

The defendant Mr. G. Hermann used the pretext that the plaintiff was late to work on days in the summer of 1982 and dated 2/16/83 (RT 124 (7-13), Exhibit 59), (Brief for Plaintiff-Appellant at Appendix III, Exhibit 59). Mr. Hermann submitted this document to Mr. Tong without the plaintiffs knoweledge there of on 2/16/83 and referenceing times and dates for the summer of 1982 with no showing of plaintiff knowledge there of. The company policies and operating procedure is that any and all adverse information place in employment personnel file be documented and shown to employee and sign by employee (RT 8 (15-25) Exhibit 203). The plaintiff establish a prima facie "disparate Impact" under Grigg v. Duke Power Co.; 401 U.S. 424, 431, 91 S. Ct. 849, 853, 28 L.Ed.2d, 158 (1971). A prima facie disparate impact case under Title VII may be established without any proof of

intentional discrimination; where business practice, neutral on its face, is shown to have a substantial, adverse impact on some group protected by Title VII, plaintiff has made out a prima facie case and rebuts the defendants pretext. Defendant Mr. Hermann place false document in plaintiff personnel file without plaintiff knowledge thereof (RT 82 (3)-(25) Exhibit 59), (Brief for Plaintiff-Appellant at Appendix III, Exhibit 59), Grigg v. Duke Power Co; Supra.

The defendant Mr. E. Kulyeshie place falsified documents in the plaintiff's personnel file without plaintiff knowledge thereof, (RT 6 (8) Exhibit 60), (Brief for Plaintiff-Appellant at Appendix IV, Exhibit 60) and (RT 200 (21) Exhibit 67), (Brief for Plaintiff-Appellant at Appendix IV, Exhibit 67). Mr. Kulyeshie submitted Exhibit 60 to Mr. Tong without the plaintiff knowledge thereof on 2/17/83 one day after Mr. Hermann submitted Exhibit 59 to Mr. Tong falsifying

the plaintiff personnel record. Here again the defendant is referencing times and dates during the summer of 1982 with no showing the plaintiffs knowledge thereof. The defendant Mr. Kulyeshie went so for as to recommend David Berry'an dismissal from work at Hughes Aircraft (RT 83 (16) Exhibit 60) last paragraph (RT 6 (14) Exhibit 60) last paragraph (RT 6 (14) Exhibit 60). Mr. Sterba submitted exhibit 61 on 2/17/83 (RT 84 (4) Exhibit 61) to Mr. Tong on the same day as Mr. Kulyeshie and one day after Mr. Hermanns exhibit 59. Exhibit 67 shows that Mr. Kulyeshie was out on "Vacation" on days he said the plaintiff was late to work (RT 212 (13) Exhibit 210, 67) (Brief fo Plaintiff-Appellant, Appendix VII, Exhibit 210, Appendix IV, Exhibit 67). The plaintiff prove a prima facie disparate treatment and disparate impact when plaintiff cross Mr. Kulyeshie and ask if he had written any one else up like me, the answer was NO, (RT 223

(17)-(20) Exhibit 67 and 60). Mr. Hermann, Mr. Kulyeshie and Mr. Sterba corrobrated and falsified the plaintiff records which caused the plaintiff to be rejected for position he applied for and eventurely terminated from work. Furco; Supra;.

The plaintiff establish a prima facie when the defendants showed the district court that one employee was hired into the department a day before plaintiff termination on 6/16/83 (RT 596 (10)-(22) Exhibit 229) and one after plaintiff termination on 6/18/83 (RT 597 (13) Exhibit 229). The defendant uses the articulated reason that one was hired to work at another Hughes facility. NO WAY!!! each department at Hughes hires there own people. The other pretextual was that the other was a long-term Ku-Band employees. The plaintiff showed the district court that the employee hired was transferred into the department (RT 597 (3)-(13) Exhibit 229). The defendant articulated reason was only a pretext.

Under McDonnell Douglas; Supra; "If the employer sought a replacement with qualifications similar to his own, thus demonstrating a continued need for the same service and skills". The plaintiff establish a prima facie and rebuts the defendants pretextual. The defendants also stated to the EEOC that all fabracted and falsified information was purge from the plaintiff personnel file (RT 588 (12)-2(25) 589 (1)-(4) Exhibit 71 and 229). When in-fact the defendant had already stated in response to plaintiffs grievence to the company that nothing would be removed (RT 589 (1)-(25) Exhibit 71). The plaintiff has showed through a preponderance of the evidence and statistical data produce, a clear pattern of intentional discrimination. The defendants articulated reason was only pretextual and now rebutted. Civil Rights Act of 1964, §701 et seq; 42 U.S.C.A. §2000 et seq; 42 U.S.C.A. §1981.

2. Hughes Did Deny Plaintiff a Transfer Because of Race

Under McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817 (1973), Teamsters; Supra. The plaintiff in Title VII trial must carry the initial burden under the statue of establishing a prima facie case of racial discrimination. The plaintiff has shown; (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of plaintiff qualifications.

The plaintiff showed in the district court that he is a minority (Brief for the plaintiff-Appellant at 14(3), Appendix #I, Exhibit 202). The plaintiff establish a prima facie case when he applied for numberous positions within defendants company. See (Brief

for Plaintiff-Appellant, Appendix II Exhibit 299), (RT 592 (11) Exhibit 299): reason for rejection "upon examination of personnel folder a long-term and repeated history of lateness, leave without permission, absense was noted he had been reprimanded in lettle change in asttitude/behavior noted". Exhibit 287 (RT 52 (6)); (Brief for Plaintiff-Appellant at Appendix II Exhibit 287) : reason for rejection "David has been requested to look for more suitable work by the other department manager (Mr. Tong) in this Laboratory. It is the general concensus that he is not adaptable to space and communication system tests, (RT30 (6)-(14) the plaintiff was qualified for this position". The plaintiff was rejection do to discrimination. Exhibit 303 (RT 52 *18); (Brief for Plaintiff-Appellant at Appendix II, Exhibit 303): reason for rejection "all hardware oriented". Exhibit 294 (RT 52 (12)); (Brief for Plaintiff-Appellant at Appendix II, 294):

reasosn for rejection "Need more hardware experience". Exhibit 296 (RT 52 (12)); (Brief for Plaintiff-Appellant at Appendix II, Exhibit 296): reason for rejection "Need more hardware experience. Exhibit 289 (RT 24(1), 52 (9) Exhibit 289 and 290); (Brief for Plaintiff-Appellant at Appendix II Exhibit 289 and 290): reason for rejection "personnel record do not support requirements for job", plaintiff was applying for a trainee position and rejected. Despite plaintiff qualification, plaintiff was rejected for each of these positions. After plaintiff rejection of Exhibit 289 job announcement remained open and the employer continued to seek applications from persons of plaintiff qualification. Exhibit 289 (RT 24 (11)-25 (22) was applied for on 9/29/82 and 4/27/83 position remained open until at least june 8, 1983; see (Brief for Plaintiff-Appellant at Appendix II Exhibit 289 and 290).

The plaintiff proved his prima facie

under Teamsters; Supra; and rebuts the defendants pretext of termination for unsatisfactory workmanship. The defendants pretext was based on fabraction and falsification of plaintiff records. The plaintiff proved his prima facie of disparate treatment and disparate impact.

3. Hughes Did Deny Plaintiff A Salary Increase Because of His Race

The Equal Pay Act standards apply in Title VII suits when plaintiff raise a claim of Equal Pay; Fair Labor Standards Act of 1938, §§ et seq; 6(d) as amended 29 U.S.C.A. §§ 201 et seq; 206(d); Civil Rights Act of 1984, § 703(a)(1) as amended 42 U.S.C.A. § 2000e-2(a)(1). The plaintiff proved a prima facie violation of the Equal Pay Act. The plaintiff showed the district court that his actual performance and content, not job titles, classification or discriptions, was at a higher level (MTS) than payed. (Brief for Plaintiff-Appellant at

Appendix VIII Exhibit 261, 18, 266 , 50 and 74). The plaintiff also verified in court that there is a difference in student engineer salary and a member of the technical staff (MTS); EEOC v. Inland Marine Industries, 729 F.2d 1229, 1234 (9th Cir.). Mr. Harrell (RT 597 (19) - (21)), Mr. Tong (RT 543 (16)-(18)), Mr. Kendall (RT 605 (9)-(13). The plaintiff was classified as a student engineer and performing the task of a (MTS) actual job performance and content Gunther v. County of Washington, 623 F.2d 1303, (9th Cir. 1979), aff'd, 452 U.S. 161, 101 S. Ct. 2242 (1981). The defendants reason for not paying the plaintiff Equal pay was only pretextual. The plaintiff proved a prima facie when he showed the court that he was passed up for his salary raise in the year 1982 and 1983 (RT 54 (13) Exhibit 49) (Brief for Plaintiff-Appellant at Appendix X, Exhibit 49), (RT 56 (4) Exhibit 280). (Brief for Plaintiff-Appellant at Appendix X Exhibit 280). The plaintiff has a

showing that links their conduct with the employer's action, Miller v. Williams, 590 F.2d 317, 320 (9th Cir. 1979). EEOC; Supra. The plaintiff disparate treatment and disparate impact the defendants reason was only a pretext. Civil Rights Act of 1964, § 701 et seq; 42 U.S.C.A. § 2000e et seq, 42 U.S.C.A. § 1981.

4. Hughes Did Harass Plaintiff

The plaintiff proved a prima facie of harassment through a preponderance of the evidence that when Mr. Tong suspended the plaintiff wrongfully, the defendant knew in advance that plaintiff had done no Wrong, (RT 39(1) Exhibit 68). After the Termination of plaintiff the defendant recommended to the company that the plaintiff is NOT to be rehired back into the department and NOT to be rehired back into the company (RT 558 (22) Exhibit 83); (Brief for Plaintiff-Appellant at Appendix X Exhibit 83). The defendant did not recomment in precluding white employee's from

being rehired back in to company, prima facie establish. The defendants reason was only a pretextual; Teamsters;Supra, Plaintiff proved a prima facie violation of Title VII when Mr. Tong, Mr. Hermann, Mr. Kulyeshie, Mr. Chin, Mr. Sugden and Mr. Ruysser falsely accused the plaintiff of time and attendance. Plaintiff proved a prima facie of harassment when Mr. Ruysser was appointed supervisor, knowing that he was not qualified to be supervisor, but only place in the position to harass the plaintiff (RT 498(2)). (RT 480(6)). The plaintiff showed that Mr. Sugden did not falsify any one else records (RT 483(11)-(14), Mr. Tong (RT 568 (3)), Mr. Kulyeshie (RT 223 (17)-(20)). The plaintiff has made out a perma facie of disparate treatment and disparate impact, Silver v. KCA, Inc., 586 F.2d 138, 141-42 (9th Cir. 1978), and Miller v. Bank of America, 600 F.2d 211 (9th Cir. 1979).

The ultimate establishment of prima

facie employment discrimination has been proven through a preponderance of evidence that plaintiff was not promoted or dismissed under conditions which, more likely that not, were based upon impermissible racial considerations. Plaintiff has shown that the incidents of harassment have shown long patterns of creating or condoning and environment at the work place which significantly and adversely affects the psychological well-being of plaintiff because of his race. McDonnell Douglas; Supra.

The plaintiff has shown more than a few isolated incidents of harassment having occurred to establish a violation of Title VII Claims, 42 U.S.C.A. §§ 1981, 1983; Civil Rights Act of 1964, §§ 701 et seq; 718, as amended, 42 U.S.C.A. §§ 2000e et seq; 2000e-17.

CONCLUSION

For the foregoing reasons plaintiff submits that the judgement of the United

States District Court for the Central District of California should be reversed, an the award of punitive damages in the amount of $6,530,000.00 and back pay, and restitution of the initiation fees, and to remand to the district court and direct that the defendants grant plaintiff seniority on the defendants roster based upon the date of employment with defendants; that the court reconsiders and award a reasonable attorney fee, and grant any other relief the court finds not consistent with this request.

Respectfully submitted,

DAVID BERRY'AN
606 Levering Ave. #216
Los Angeles, Ca. 90024
(213) 824-1982
Plaintiff
In Propria Personae

Of Counsel
LATHAM & WATKINS
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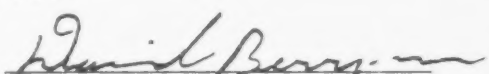
April 2, 1987



DAVID BERRY'AN
April 2, 1987

PROOF OF SERVICE BY MAIL

I, the undersigned, say:

I am employed in, or a resident of, the County of Los Angeles, over the age of eighteen. My resident address is:

606 Levering Ave # 216
Los Angeles, Calif. 90024

On July 22, 1987, I served the following document(s):

"PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT"

In the within cause by placing true, correct, and complete copies thereof in each of separate envelopes, which were addressed, respectively, as follows:

LATHAM & WATKINS
Deanne P. George
Keith M. Parker
701 "B" St, Suite 2100
San Diego, Calif. 92101-8197

and then by sealing said envelopes and depositing the same, with postage thereon fully prepaid, in the United States mail at Los Angeles Executed on July 22, 1987.

David Berry'an

David Berryman
(Signature)

PROOF OF SERVICE BY MAIL

I, the undersigned, say:

I am employed in, or a resident of, the County of Los Angeles, over the age of eighteen. My resident address is:

606 Levering Ave # 216
Los Angeles, Calif. 90024

On September 6, 1987, I served the following document(s):

"PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT"

In the within cause by placing true, correct, and complete copies thereof in each of separate envelopes, which were addressed, respectively, as follows:

LATHAM & WATKINS
Deanne P. George
Keith M. Parker
701 "B" St, Suite 2100
San Diego, Calif. 92101-8197

and then by sealing said envelopes and depositing the same, with postage thereon fully prepaid, in the United States mail at Los Angeles Executed on September 6, 1987.

David Berry'an

David Berryman
(Signature)

PROOF OF SERVICE BY MAIL

I, the undersigned, say:

I am employed in, or a resident of, the County of Los Angeles, over the age of eighteen. My resident address is:

606 Levering Ave # 216
Los Angeles, Calif. 90024

On September 26, 1987, I served the following document(S):

"PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT"

In the within cause by placing true, correct, and complete copies thereof in each of separate envelopes, which were addressed, respectively, as follows:

LATHAM & WATKINS
Deanne P. George
Keith M. Parker
701 "B" St, Suite 2100
San Diego, Calif. 92101-8197

and then by sealing said envelopes and depositing the same, with postage thereon fully prepaid, in the United States mail at Los Angeles Executed on September 26, 1987.

David Berry'an

(Signature)

No. 87-512

In the Supreme Court

OF THE

United States

OCTOBER TERM 1987

DAVID BERRY'AN,
Petitioner,

VS.

HUGHES AIRCRAFT COMPANY,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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October 21, 1987

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QUESTION PRESENTED[1]

Did the court below err in affirming the district court's judgment for respondent after trial on petitioner's claims of race discrimination in employment brought pursuant to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e — 2000e-17, and the Civil Rights Act of 1866, 42 U.S.C. § 1981?

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[1]The parties to the proceeding below were petitioner David Berry'an and respondent Hughes Aircraft Company. The individual defendants set forth in the caption were dismissed by the district court prior to trial.

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No. 87-512

In the Supreme Court

OF THE

United States

OCTOBER TERM 1987

DAVID BERRY'AN,
Petitioner,

VS.

HUGHES AIRCRAFT COMPANY
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Respondent Hughes Aircraft Company ("HAC") respectfully requests that this Court deny the petition of David Berry'an ("Berry'an") for a writ of certiorari, seeking review of the decision and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on March 19, 1987.

OPINION AND JUDGMENT BELOW

The opinion of the court of appeals (an unpublished memorandum decision) and the findings of fact and conclusions of law of the United States District Court for

the Central District of California are reproduced in the Appendix hereto.

STATUTES AND RULES INVOLVED

The Civil Rights Act of 1866, 42 U.S.C. § 1981 and pertinent parts of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e — 2000e-17 are set forth in the Appendix hereto.

I

STATEMENT OF THE CASE

Berry'an's statement of facts to this Court contains numerous assertions not supported by the evidence and directly contrary to the findings entered by the trier of fact. HAC will not attempt to respond to each instance in which Berry'an has departed from the record below, because the question before this Court is whether this action raises any issue which merits this Court's review. HAC therefore submits only a brief summary of the facts of this case prior to addressing the foregoing question.

Berry'an was employed by HAC from June 2, 1975 to June 17, 1983, when he was laid off. Berry'an filed a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC") in July 1983 and, in June 1984, the EEOC issued Berry'an a right to sue letter. On August 8, 1984, Berry'an filed a complaint against HAC, alleging that he suffered racial discrimination during his employment with HAC. Specifically, Berry'an claimed that because of his race (black) he was terminated from his job, denied a transfer, passed over for salary increases and harassed at his work place.

After a bench trial, the district court granted judgment for HAC. The district court found that Berry'an had failed to establish a *prima facie* case of race discrimination in connection with the termination, transfer and salary decisions, and further that even had Berry'an established a *prima facie* case, HAC had articulated a non-discriminatory reason for its conduct and Berry'an had failed to meet his ultimate burden of proving that HAC's articulated reason was pretext for a discriminatory motive. In addition, the trial court found that Berry'an failed to prove a continuous and extensive course of harassment directed against him because of his race.

With respect to Berry'an's claim of discriminatory termination, the evidence overwhelmingly showed and the trial court found that Berry'an was laid off because he had a long history of attendance problems. Numerous supervisors testified that Berry'an arrived late, left early and was absent from his work station for long periods of time. The trial court noted that it strongly believed the supervisors who unanimously asserted that they did not discriminate against Berry'an. Performance appraisals and other documents detailed Berry'an's attendance problems. Berry'an did not present any credible evidence at trial that he was laid off because of his race. Instead, he simply asserted that he was performing satisfactorily and, therefore, his layoff must have resulted from discrimination. What little evidence Berry'an offered to support his claim actually confirmed his serious attendance problems.

With respect to Berry'an's claim that he was denied a transfer because of racial discrimination, Berry'an offered evidence at trial of only five positions at HAC for which he had applied. While he initially asserted that he was qualified for all five of these positions, on cross

examination Berry'an admitted that he did not have the training or experience required for any of these positions. The evidence showed and the district court concluded that Berry'an had produced no evidence that he was denied a transfer because of his race.

Evidence relating to Berry'an's claim that he was passed over for salary increases in March 1982 and 1983 because of racial discrimination actually demonstrated that Berry'an had received regular annual salary increases throughout his employment with HAC, including a 10% increase in March 1981 and a 26% increase in December 1981. The trial court found that Berry'an did not receive an increase in March 1982 because of his substantial increase in late 1981, and did not receive an increase in March 1983 because of his serious attendance problems which compromised the quality of his work.

Finally, Berry'an's claim of racial harassment was found by the trial court to be without merit. In attempting to prove a continuous and extensive course of harassment, Berry'an produced evidence of only one instance of alleged harassment — an arguably derogatory document anonymously sent to Berry'an in the inter-office mail — which Berry'an admittedly never called to the attention of his supervisors. Except for his own testimony, Berry'an offered no evidence that HAC falsely accused him of maintaining poor work habits, while HAC produced numerous credible witnesses who testified that Berry'an had poor work habits.

The district court's evaluations of the credibility of the witnesses was extremely significant in this case. Berry'an alleged that his performance was excellent, that his attendance was exemplary, and that his supervisors were falsely accusing him of attendance problems. This testimony is impossible to reconcile with that of his supervi-

sors, who consistently testified that Berry'an habitually arrived late, left early, and took long unauthorized breaks during the work day. To believe Berry'an would require this Court to believe that all of the supervisors were lying when they wrote their appraisals and testified at trial. The district court concluded that it believed the supervisors.

II

REASON REVIEW SHOULD BE DENIED

This action and the decision below do not present any question suitable for this Court's review. The fundamental premise of Berry'an's appeal to the Ninth Circuit was that the trial court erred by failing to resolve in his favor the conflicts between his testimony and that of other witnesses. Berry'an makes essentially the same argument to this Court; his argument does not raise any important questions of law, nor has Berry'an pointed to any conflict between the circuits which is raised by the proceedings herein. In fact, Berry'an raises no question of law, but merely requests this Court to yet again review the facts of this case.

In considering Berry'an's Title VII claims, the trial court properly followed the guidelines for allocating the burden of proof and production of evidence in a Title VII case set forth by this Court in *McDonnell Douglas Corp. v. Greene*, 411 U.S. 792 (1973) and further explained in *Board of Trustees of Keene State College v. Sweeney*, 439 U.S. 24 (1978), and *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981). The trial court found that Berry'an failed to establish a *prima facie* case of discrimination under Title VII with regard to the termination, transfer and salary decisions. Alternatively, the court found that even assuming that Berry'an had proved a *prima facie* case of discrimination, HAC's ar-

ticulated reasons for his actions successfully rebutted Berry'an's showing, and Berry'an failed to carry his ultimate burden of proving that HAC's reasons were a pretext for a discriminatory motive.

With respect to Berry'an's discriminatory harassment claim, the district court found that Berry'an failed to prove a continuing and extensive course of harassment directed against him because of his race, or that any of his supervisors at HAC were aware of alleged harassment by co-employees which they failed to remedy. *Silver v. KCA, Inc.*, 586 F.2d 138 (9th Cir. 1978). In sum, the trial court found that Berry'an did not establish any violation of Title VII or Section 1981 by defendant HAC and was therefore not entitled to any relief.

The Ninth Circuit affirmed. In reaching its decision, the Ninth Circuit concluded that because the case was fully tried, review should focus on the ultimate issue of discrimination, not on whether a *prima facie* case was established. *United States Postal Service v. Aikens,* 460 U.S. 711, 715 (1983); *Casillas v. United States Navy*, 735 F.2d 338, 343 (9th Cir. 1984). The Ninth Circuit found that the district court's conclusion that Berry'an had failed to meet his burden of demonstrating race discrimination was not clearly erroneous.

Nothing in the Ninth Circuit's treatment of these issues raises a question that this Court should consider. As this Court observed in *Anderson v. City of Bessemer City*, ____ U.S. ____, 105 S.Ct. 1504, 1511-12 (1985),

> [b]ecause a finding of intentional discrimination is a finding of fact, the standard governing appellate review of a district court's finding of discrimination is that set forth in Federal Rule of Civil Procedure 52(a): "Findings of fact shall not be set aside unless

> clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."
>
> . . .
>
> The rationale for deference to the original finder of fact is not limited to the superiority of the trial judge's position to make determinations of credibility. The trial judge's major role is the determination of fact, and with experience in fulfilling that role comes expertise. Duplication of the trial judge's efforts in the court of appeals would very likely contribute only negligibly to the accuracy of fact determination at a huge cost in diversion of judicial resources. In addition, the parties to a case on appeal have already been forced to concentrate their energies and resources on persuading the trial judge that their account of the facts is the correct one; requiring them to persuade three more judges at the appellate level is requiring too much. As the Court has stated in a different context, the trial on the merits should be the " 'main event' . . . rather than a 'tryout on the road.' " *Wainwright v. Sykes*, 433 U.S. 72, 90, 97 S.Ct. 2497, 2508, 53 L.Ed.2d 594 (1977). For these reasons, review of the factual findings under the clearly-erroneous standard — with its deference to the trier of fact — is the rule, not the exception.

In his petition for writ of certiorari, Berry'an once again asserts that the evidence adduced at trial established a *prima facie* case of discrimination. Having failed to persuade the district court and the court of appeals that the facts support his claim, Berry'an is not now entitled to a third review of such facts by this Court.

III

CONCLUSION

HAC respectfully submits that Berry'an has wholly failed to sustain his burden of establishing under Rule 17 of this Court's rules that there are special and important reasons why review should be granted. The decision below does not involve an important question of federal law which should be settled by this Court. The Ninth Circuit's decision is in complete accord with decisions of other courts of appeals and this Court. Indeed, Berry'an raises no question of law at all, but rather seeks yet another review of the facts of this case. For the foregoing reasons, HAC respectfully requests that Berry'an's petition for writ of certiorari be denied.

Dated: October 21, 1987

Respectfully submitted,

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APPENDIX

42 U.S.C. 1981

§ 1981. Equal Rights Under the Law.

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C. § 2000e — 2000e-17 (in pertinent part)

§ 2000e-2. Unlawful Employment Practices.

(a) It shall be an unlawful employment practice for an employer —

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

DAVID BERRY'AN,
Plaintiff,
VS.
HUGHES AIRCRAFT COMPANY, a corporation;
THOMAS W. TONG; D.M. SUGDEN; A.H. RUYSSER;
EDWARD KULYESHIE; GERALD HERMANN; and
DOES 1 through 10, inclusive,
Defendants.

Civil No. CV 84-6158 WDK

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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This action was brought on for trial before this Court, the Honorable William D. Keller presiding, on November 12, 1985. The Court having examined the pleadings, files and records of this action, having considered the evidence introduced at trial and having heard the arguments of counsel, makes the following findings of fact and conclusions of law:

I

FINDINGS OF FACT

[The Parties and Procedural Background]

1. Defendant Hughes Aircraft Company ("HAC") is a corporation with its principal place of business in Los Angeles County, California. Generally speaking, HAC is engaged in the research, development and manufacture of products for the defense and aerospace industries.

2. Plaintiff David Berry'an ("plaintiff"), a black male, was hired by HAC on June 2, 1975 as a Student Engineer. Plaintiff worked in a number of different departments within HAC until he was laid off for lack of work from his position as a Test Engineer with HAC's Space and Communications Group on June 17, 1983.

3. On July 12, 1983, plaintiff filed a charge of discrimination against HAC (numbered 092831489) (the "Charge") with the Equal Employment Opportunity Commission (the "EEOC") at its District Office in Los Angeles, California. Plaintiff claimed therein that he was "discharged" by HAC in June 1983, denied in-house transfers prior thereto, denied salary increases, and harassed because of his race.

4. On June 4, 1984, plaintiff received a statutory "right-to-sue" letter from the EEOC, at which time the

EEOC terminated further processing of plaintiff's charge without reaching a decision on the merits.

[Plaintiff's Initial Period of Employment]

5. Plaintiff was hired by HAC on June 2, 1975 as a Student Engineer 2. This job classification was used for employees working on HAC-approved work-study schedules while enrolled in an accredited college or university program leading to a B.S. degree in engineering. At the time he was hired, plaintiff was enrolled at UCLA extension in an engineering program. However, plaintiff never obtained his B.S. degree during the eight years he was employed with HAC. HAC's records show that plaintiff took only two courses at UCLA, obtaining a grade of C in each; UCLA records reveal that plaintiff received poor or failing grades in several other courses.

6. Prior to commencing work with HAC, plaintiff had taken college-level courses at the University of Maryland, where he received poor and failing grades in some classes and was academically dismissed three times. Plaintiff misrepresented his academic standing at the University of Maryland on the employment application he submitted to HAC.

7. Plaintiff began work in HAC's Field Support and Services Division (Division 28) located at HAC's Airport Site. His initial assignment involved writing and running computer test programs for an automated test station, using the Basic computer language. Plaintiff's supervisor on this project, Mr. Phil Highducheck, was generally satisfied with plaintiff's work, and gave him an overall rating of average on a written performance appraisal completed in early 1976.

8. When this program was terminated in the fall of 1976, plaintiff transferred to HAC's Electro-Optical and

Data Systems Group, located in El Segundo, California. Plaintiff joined an engineering department responsible for the automatic test equipment used to test the guidance system on the MK-5 missile. Plaintiff helped to write computer programs designed to test various modules on this automatic test station, using a computer test language called Atlas. Plaintiff's first supervisors on this project, Messrs. Dominick Cardella and Robert Lemestre, gave plaintiff an overall rating of slightly above average on written performance appraisals completed in March 1977, but noted that plaintiff was progressing at a slow pace and that his punctuality and attendance "left something to be desired." Lemestre discussed these appraisals with plaintiff in March 1977, and advised plaintiff that he was expected to correct his attendance problems.

9. On October 20, 1977, plaintiff was warned in writing about his attendance problems by Mr. Earl Peay, Manager of the MK-5 automatic test equipment department. Plaintiff's supervision noted in this written warning that plaintiff had been verbally warned on several earlier occasions that he should correct his habit of arriving late and leaving early. Plaintiff received a copy of this written warning, which advised him that failure to correct his poor work habits could lead to further discipline, including suspension or discharge. Plaintiff continued to have attendance problems during the time he worked in this organization.

10. In early 1978, Mr. Ronald Fong, then plaintiff's immediate supervisor in the MK-5 automatic test equipment department, completed another written performance appraisal of plaintiff. Fong rated plaintiff as somewhat below average overall. In this appraisal, which was also discussed with plaintiff, Fong noted that plaintiff needed to gain additional experience and obtain his B.S. degree

in engineering to improve his work performance. Plaintiff was also advised to take more initiative in seeking work and added responsibilities.

11. In the fall of 1978, plaintiff requested and was given permission by his supervision to look for another position within HAC. In October 1978, plaintiff obtained a position with the Radar Design Automation Center, part of HAC's Radar Systems Group. The Radar Design Automation Center was a new organization set up to provide computer-aided design services to Radar Systems Group engineers.

12. Plaintiff remained in the Radar Design Automation Center for only about one month.

13. In early 1979, plaintiff obtained another position within Radar Systems Group. Plaintiff continued to have problems with his attendance in this organization. He was verbally counseled and warned about coming to work late on more than one occasion, but still failed to correct this problem. After this incident, plaintiff asked for permission to transfer to another position within HAC, which was granted.

[Plaintiff's Employment with the Space and Communications Group and Subsequent Layoff]

14. During the remainder of his employment with HAC, plaintiff worked at HAC's Space and Communications Group on the Ku-Band program. Generally speaking, this program involved the design, development and testing of a special radar and communications systems ultimately used in the NASA space shuttles. Plaintiff was involved in various projects associated with the testing of this system. Plaintiff initially reported to Mr. Bing Chin, Senior Project Engineer, and was assigned to help with

initial testing of the first Ku-Band system, and of a field test set designed to test that system once it was installed on the space shuttle.

15. In September 1980, Chin completed a written evaluation of plaintiff's work performance, rating it as generally satisfactory. However, Chin noted several specific areas in which plaintiff should improve his performance, the first of which was punctuality and attendance. Chin also suggested that plaintiff work on improving his interactions with co-workers, and that he take more initiative in understanding his assignments and determining what steps were required to complete his assigned tasks. Chin discussed this review with plaintiff.

16. In the latter part of 1980 and the first part of 1981, plaintiff was on staff to the Systems Engineering Manager for the Ku-Band program. Plaintiff was given the responsibility of documenting specifications and learning test requirements for one of the units that made up the Ku-Band system, the Electronic Assembly 2 (EA-2) unit. Plaintiff reported to Mr. Frank Joyce and then Mr. Lance Mohler during this period of time. Plaintiff continued to exhibit attendance problems and problems interacting with co-workers during this period.

17. In August 1981, while working on the EA-2 unit test procedures, plaintiff again demonstrated his lack of dependability by failing to advise his supervisor of vacation plans in advance of taking vacation. Instead, plaintiff called in to request vacation on a daily basis for a week, causing a delay in test procedures.

18. On August 25, 1981, plaintiff received a written warning for poor attendance and tardiness from his then supervisor, Mr. Don Sugden. Plaintiff was reminded that he had been directed to keep regular working hours and

to advise the engineer in charge of test procedures of his whereabouts so that test schedules could be drawn up and met. A log maintained by supervision showed that plaintiff repeatedly arrived late or not at all during the seven-week period preceding this warning.

19. On September 30, 1981, Mr. Jerry Ruysser, the engineer in charge of the above test procedures, completed a written evaluation of plaintiff's work. Ruysser rated plaintiff as an average performer with one bad trait. Ruysser noted that plaintiff was constantly late to work, would leave the work area for lengthy periods of time without advising supervision of his whereabouts, and was frequently absent for the entire day without advance notice. Ruysser noted that plaintiff needed to correct these poor work habits if he was going to progress in the engineering field, because supervision could not rely on him so long as such habits persisted. Ruysser discussed this evaluation with plaintiff in October 1981.

20. Sometime in late 1981, Mr. Thomas Tong replaced Sugden as the Senior Engineer in charge of the Ku-Band test operations. Tong endeavored to give plaintiff a "fresh start" under his supervision. In early March 1982, Tong completed a written appraisal of plaintiff's performance, rating him as a slightly above average in overall performance and commenting positively on plaintiff's work. It was Tong's hope that such positive reinforcement would have a positive effect on plaintiff's work habits.

21. By late May 1982, Tong was still satisfied with plaintiff's performance, to the extent that he recommended plaintiff for a special salary increase. However, before the processing on this recommendation had been completed, Tong learned of further instances of work problems on the part of plaintiff (as set forth below),

which led Tong to put a "hold" on the special increase pending plaintiff's correction of these problems.

22. In July 1982, Mr. Gerald Hermann was in charge of certain test procedures for the Ku-Band program, and plaintiff was assigned by Tong to work under Hermann's direction. At this time, Hermann reported to Tong that plaintiff had been misstating the number of hours he worked on his time cards. While plaintiff and the other technical staff who worked on the Ku-Band program were not hourly employees and therefore did not have to punch a time card, they were responsible for filling out a daily time card to verify the number of hours they worked on a project for accounting purposes. As a defense contractor, HAC was required to maintain such records. Hermann reported to Tong that he had spoken to plaintiff on several occasions about arriving late, leaving early and then overstating his hours (including claiming overtime) on his time cards. Like a number of supervisors before him, Hermann was also concerned that he could not depend on plaintiff when tests were being run.

23. In response to the above reports, Tong met with plaintiff on July 23, 1982 to advise him to correct such work habits. Plaintiff took the position that he was falsely accused and that he was working extended hours each day. Tong memorialized this meeting in a memorandum to plaintiff dated August 2, 1982, stating that the memorandum would not be placed in plaintiff's personnel file unless continued monitoring of his attendance showed that plaintiff was tardy or absent in the future. Tong also told plaintiff in this meeting that he would recommend reinstatement of plaintiff's special salary increase if plaintiff did not have attendance problems in the future.

24. Plaintiff did not meet the performance standards set by Tong in the above meeting. During August 1982,

plaintiff was assigned to work at the Baldwin Hills Antenna Range as a member of the team conducting system tests for the Ku-Band program. These tests were run with two shifts per day for six days a week. Again, punctuality and attendance on the part of each team member was critical to the successful and timely completion of the tests. According to the gate guard's records of plaintiff's check-in and check-out times at the test location, plaintiff was habitually late to work during this time period. The supervisors in charge at the Baldwin Hills test operations and the test team leaders confirmed that plaintiff continued to have attendance problems during this time period, that he misstated the number of hours worked on his time cards, and that he had difficulty working with other team members.

25. As a result of plaintiff's continued attendance problems and inability to get along with co-workers, Tong concluded that he no longer required plaintiff's services on the Ku-Band program. Thus, on September 22, 1982, plaintiff was advised in a meeting and in writing that he should look for alternative employment within or outside of HAC because of his poor work habits. HAC made its Career Opportunity Program available to plaintiff to assist him in identifying and applying for openings within HAC.

26. By November 1982, plaintiff had not succeeded in finding other employment with HAC. At this time, Tong temporarily assigned plaintiff to work for Mr. Paul Sterba in the Ku-Band program office. On February 17, 1983, Sterba evaluated plaintiff's performance in a memorandum to Tong. Sterba reported that plaintiff was consistently tardy and absent from his work station despite counseling from Sterba, and that he had problems completing certain work assignments.

27. On February 23, 1983, Tong met with plaintiff and gave him another written warning about his attendance and poor work performance. Plaintiff was warned that continued unsatisfactory performance would result in further discipline, including suspension or discharge. Plaintiff was also advised of his new assignment, which would be reporting to Messrs. Ed Kulyeshie and Roger May to assist with certain Ku-Band test procedures.

28. May and Kulyeshie provided plaintiff with his work assignments during the next several months. They observed that plaintiff continued to have attendance problems, and that he failed to report when he would be absent from the work area, as directed to do so by Tong. Consequently, on March 14, 1983, Tong suspended plaintiff without pay for three days. Even after this disciplinary suspension, plaintiff failed to correct his deficient work habits.

29. After he was suspended, plaintiff filed an internal complaint with HAC's Human Resources organization. Ms. Elaine Harrell, an Employee Relations representative, investigated plaintiff's complaint that he had been unjustly suspended, interviewing plaintiff and his supervision. Harrell found no basis for concluding that plaintiff's management had acted improperly. She also assisted plaintiff with his efforts to secure a transfer to another position.

30. In March 1983, Tong completed a written performance appraisal of plaintiff's performance during the past year. Tong rated plaintiff as less than "barely acceptable" overall, noting that plaintiff had been warned repeatedly about poor work habits with no discernable results. Tong discussed this appraisal with plaintiff.

31. By June 1, 1983, plaintiff's supervision decided that plaintiff would be laid off by June 17, 1983 if he had not found alternative employment with HAC before such time. This decision was reached in light of the scheduled phase-down of the Ku-Band program, the lack of appropriate assignments for plaintiff, and plaintiff's poor work habits. Plaintiff was advised of this decision in a meeting with his supervision on June 2, 1983.

32. Plaintiff failed to obtain another position with HAC prior to June 17, 1983, and on that date, he was laid off. Another individual who worked on the Ku-Band program was on personal leave at this time and was subsequently laid off because of poor performance. This engineer was white. Plaintiff was not replaced after he was laid off. Plaintiff was not selected for layoff because of his race, and HAC did not discriminate against plaintiff by laying him off or disciplining him as set forth above. Each of the aforementioned supervisors denied discrimination and this Court *strongly* believes them.

[Plaintiff's Attempts to Transfer Within HAC]

33. When plaintiff was advised by his supervision in the Ku-Band program to look for other work within HAC, he utilized HAC's Career Opportunity Program to identify openings at other HAC facilities. Plaintiff filled out applications for a number of engineering positions, which were forwarded to the appropriate hiring supervisor for his or her consideration. Plaintiff was not selected for any of these openings.

34. HAC did not discriminatorily interfere with plaintiff's efforts to secure a transfer to another position. Rather, plaintiff was not selected for the other positions he sought for a number of legitimate reasons. In at least one instance, the opening was withdrawn and no one was

hired because the project was phased out. In other instances, there were no openings for plaintiff's desired work. Plaintiff also lacked necessary experience and/or educational qualifications for a number of positions for which he applied. During at least one interview, plaintiff misrepresented himself as an "MTS," a Member of HAC's Technical Staff, which is a job classification used only for employees who have an engineering or other hard-science degree or at least 10 years of equivalent technical work experience. Plaintiff was never qualified to be an MTS while he was employed at HAC, and he was never classified as such by HAC. Note should be made that when the plaintiff sought relocation certain negative evaluations from the Ku-Band supervisors was purposely withheld from the personnel file.

[Plaintiff's Salary History]

35. When plaintiff was hired in June 1975, he was classified as a Student Engineer 2, and earned $200 per week.

36. HAC's salaried employees are normally reviewed annually by supervision for the purpose of determining whether they will receive a salary increase, and if so, the amount thereof. These increases are not automatic, but are based on the employees' performance and on HAC's financial status, which determines the total amount available in the "merit pool." These increases are given out in March of each year. In addition, special increases or adjustments may be awarded outside the annual review cycle in order to, for example, recognize outstanding performance, alleviate rate inequities, or recognize added responsibilities corresponding to a promotion.

37. In March 1976, plaintiff received an annual increase of $10 per week (5 percent), bringing his weekly salary to $210.

38. In March 1977, plaintiff received an annual increase of $20 per week (9 percent), bringing his weekly salary to $230.

39. In March 1978, plaintiff received an annual increase of $17 per week (7 percent), bringing his weekly salary to $247.

40. In March 1979, plaintiff received an annual increase of $25 per week (10 percent), bringing his weekly salary to $272.

41. In March 1980, plaintiff received an annual increase of $53 per week (19 percent), bringing his weekly salary to $325.

42. In March 1981, plaintiff received an annual increase of $33 per week (10 percent), bringing his weekly salary to $358.

43. In December 1981 and at plaintiff's request, his supervision in the Ku-Band program approved a special increase and promotional reclassification for plaintiff. Plaintiff had been classified as a Student Engineer for six years due to his inability to obtain a B.S. degree in engineering, which would have enabled him to be reclassified as an MTS. In order to better recognize plaintiff's work experience, and because it appeared that plaintiff would not finish his program of studies leading to an engineering degree, his supervision agreed to a $92 increase (26 percent) in salary and a promotion to the non-MTS position of Test Engineer 1. After this increase, plaintiff's salary was $450 per week.

44. Because plaintiff had received such a large increase in December 1981, he did not receive an additional salary increase in March 1982.

45. In August 1982, plaintiff received a $20 increase (4 percent) in salary from his supervision in the Ku-Band program, bringing his weekly salary to $470. While by this time plaintiff's supervision had serious concerns about his work performance in general and attendance problems in particular, plaintiff assured his management that he would correct these problems and that he would respond well to the financial incentive of a salary increase. HAC therefore decided to give plaintiff the benefit of the doubt and to try to obtain improvement in his work performance with some "positive reinforcement." HAC elected to give plaintiff a small increase at this time, with the idea that he would receive an additional increase in March 1983 if he performed well during the interim and corrected his attendance problems.

46. Plaintiff was passed over for an increase in March 1983 because of his inadequate work performance.

47. Plaintiff did not suffer salary discrimination during his employment with HAC. Plaintiff's race was not a factor in decisions made by his supervision concerning his salary and salary increases.

[Plaintiff's Alleged Harassment]

48. HAC did not harass plaintiff because of his race. None of plaintiff's supervisors made derogatory racial comments to or about plaintiff, or sent any derogatory material to plaintiff. Although on one occasion plaintiff received an arguably derogatory document in the interoffice mail, plaintiff never brought this document to his supervisors' attention or complained of any other alleged

acts of harassment against him. Plaintiff's supervisors were never aware of any such alleged harassment.

II

CONCLUSIONS OF LAW

1. This Court has jurisdiction over this action, in which plaintiff alleges that HAC violated Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.* ("Title VII"), and the Civil Rights Act of 1866, 42 U.S.C. § 1981 ("Section 1981").

2. The standards for establishing an individual disparate treatment claim under Title VII also apply to a similar claim under Section 1981. *Gay v. Waiters' Union, Local 30*, 694 F.2d 531 (9th Cir. 1982); *Tagupa v. Board of Directors*, 633 F.2d 1309 (9th Cir. 1980).

3. Plaintiff has the burden of proving a *prima facie* case of race discrimination in connection with HAC's decision to lay him off in June 1983 and failure to select him for another position within HAC prior thereto. The order and allocation of proof set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817 (1973) can be applied to claims of other types of discrimination, such as a layoff or failure to transfer claim. *Grubb v. W. A. Foote Memorial Hospital*, 714 F.2d 1486 (6th Cir. 1984), *rehearing granted and vacated on other grounds*, 759 F.2d 546 (6th Cir. 1985).

4. In order to establish a *prima facie* case of race discrimination in connection with his layoff, plaintiff must prove that he was black; that he was qualified for the job he was performing; that, although he was performing satisfactorily, he was laid off; and that after his layoff, someone with comparable qualifications performed the same work. *Grubb v. W. A. Foote Memorial Hospital*, *supra*;

Hobson v. Western Airlines, 25 FEP Cases 1509, 1515 (N.D. Cal. 1980).

5. Plaintiff failed to prove the above *prima facie* case, in that plaintiff failed to prove that he was performing satisfactorily when he was laid off or that he was replaced. *Yeh v. System Development Co.*, 23 FEP Cases 1810 (C.D. Cal. 1978), *aff'd*, 614 F.2d 778 (9th Cir.), *cert. denied*, 449 U.S. 824, 101 S. Ct. 85 (1980).

6. Even assuming for the sake of argument that plaintiff established a *prima facie* case of race discrimination in connection with HAC's decision to lay him off, HAC met its burden of producing evidence of non-discriminatory reasons for its conduct. HAC demonstrated that it selected plaintiff for layoff because the Ku-Band project was phasing down and because plaintiff was not adequately performing his job duties and had a long history of serious attendance problems.

7. In order to show a *prima facie* case of race discrimination in connection with HAC's failure to offer him a transfer position, plaintiff must prove that he applied and was qualified for a job that HAC was trying to fill; that although qualified, he was rejected; and that thereafter the position remained open and HAC continued to seek applicants with plaintiff's qualifications. *Thorne v. City of El Segundo,* 726 F.2d 459 (9th Cir. 1983), *cert. denied,* ____ U.S. ____, 105 S. Ct. 380 (1984); *McDonnell Douglas Corp. v. Green, supra.*

8. Plaintiff failed to prove the above *prima facie* case, in that plaintiff failed to prove that he was qualified for the positions he sought, that such positions remained open, or that HAC continued to seek candidates from persons of his qualifications.

9. Even assuming for the sake of argument that plaintiff established a *prima facie* case of race discrimination in connection with HAC's failure to offer plaintiff a transfer position within HAC, HAC met its burden of producing evidence of non-discriminatory reasons for its conduct. HAC showed that plaintiff was not selected for the positions for which he applied because the positions were withdrawn or because plaintiff was not qualified for such positions or was not the best candidate in light of past experience and performance.

10. Plaintiff failed to carry his burden or proving that HAC's articulated reasons for its conduct in not selecting plaintiff for a transfer opening were pretext for a discriminatory motive based on plaintiff's race. *Texas Department of Community Affairs v. Burdine,* 540 U.S. 248, 101 S. Ct. 1089 (1981); *Board of Trustees of Keene State College v. Sweeney,* 439 U.S. 24, 99 S. Ct. 295 (1978).

11. Plaintiff has the burden of proving a *prima facie* case of race discrimination in connection with the salary decisions made by HAC in 1982 and 1983. In order to establish such a *prima facie* case, plaintiff must prove that HAC paid him less than white employees for substantially equal work in terms of the skill, efforts and responsibility required. *Gunther v. County of Washington,* 633 F.2d 1303 (9th Cir. 1979), *aff'd,* 452 U.S. 161, 101 S. Ct. 2242 (1981).

12. Plaintiff failed to prove the above *prima facie* case, in that plaintiff failed to prove that he received salary increases less than those received by white employees performing substantially equal work in terms of the skill, efforts, and responsibility required.

13. Even assuming for the sake of argument that plaintiff established a *prima facie* case of race discrimina-

tion in connection with the salary decisions made by HAC in 1982 and 1983, HAC met its burden of producing evidence of non-discriminatory reasons for its conduct. HAC demonstrated that the differences in salary increases among employees on the Ku-Band project were the result of HAC's merit system of salary administration and significant differences between the quality of the various employees' performances. In particular, HAC demonstrated that plaintiff was not performing satisfactorily and had a long history of serious attendance problems.

14. Plaintiff failed to carry his burden of proving that HAC's articulated reasons for its conduct were pretext for a discriminatory motive based on plaintiff's race. *Texas Department of Community Affairs v. Burdine, supra; Board of Trustees of Keene State College v. Sweeney, supra.*

15. In order to prevail on a claim of discriminatory harassment, plaintiff must prove that he was subjected to a continuing and extensive course of harassment because of his race, that HAC was aware of such harassment, and that HAC failed to take reasonable steps to remedy such harassment. *Silver v. KCA, Inc.,* 586 F.2d 138 (9th Cir. 1978); *DeGrace v. Rumsfield,* 614 F.2d 796 (1st Cir. 1980); *Gairola v. Virginia Department of General Services,* 753 F.2d 1281 (4th Cir. 1985).

16. Plaintiff failed to prove a continuing and extensive course of harassment directed against him because of his race, or that any of his supervisors at HAC were aware of alleged harassment by co-employees which they failed to remedy. Plaintiff's receipt of a single derogatory document sent anonymously through the intra-office mail is insufficient to establish a continuing and extensive course of harassment, and plaintiff never complained to his supervision regarding this or any other alleged harass-

ment by his co-workers. HAC was unaware of plaintiff's receipt of the derogatory document or any other alleged harassment suffered by plaintiff.

17. Plaintiff did not establish any violation of Title VII or Section 1981 by defendant HAC and, therefore, plaintiff is not entitled to any relief whatsoever in this action.

18. HAC is entitled to judgment against plaintiff on plaintiff's complaint. HAC is also entitled to recover from plaintiff its costs of suit and reasonable attorneys' fees incurred herein. Section 706(k) of Title VII; *Christianburg Garment Co. v. Equal Employment Opportunity Commission,* 434 U.S. 412, 98 S. Ct. 694 (1978); *N.O.W. v. Bank of California,* 680 F.2d 1291 (9th Cir. 1982).

Each of the foregoing findings of fact which may be construed as a conclusion of law is hereby deemed to be a conclusion of law, and each of the foregoing conclusions of law which may be construed as a finding of fact is hereby deemed to be a finding of fact.

DATED: December 5, 1985

/s/ WILLIAM D. KELLER
United States District Judge

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DAVID BERRY'AN,
Plaintiff-Appellant,
vs.
HUGHES AIRCRAFT COMPANY, a corporation, THOMAS W. TONG, an individual, A. H. RUYSSER, an individual, EDWARD KULYESHIE, an individual, GERALD HERMANN, an individual, and DOES 1 through 10,
Defendants-Appellees.

Appeal from the United States District Court
for the Central District of California
Honorable William D. Keller, District Judge, Presiding
Submitted: December 12, 1986
San Francisco, California**
Filed: March 19, 1987

No. 86-5521

DC No. CV 84-6158-WDK

MEMORANDUM *

Before: BARNES, SKOPIL, and CANBY, Circuit Judges.

The district court's judgment is affirmed. Berry'an failed to establish the ultimate issue of discrimination with respect to all or any of his Title VII claims and,

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 21.

** The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a) and 9th Cir. Rule 3(f).

therefore, the district court's judgment was not clearly erroneous. *See Casillas v. United States Navy,* 735 F.2d 338, 343-44 (9th cir. 1984). Moreover, this action was based on frivolous grounds and, therefore, the district court did not abuse its discretion in awarding Hughes attorneys fees. *See Mitchell v. Los Angeles County Superintendent of Schools,* 805 F.2d 844, 847-48 (9th cir. 1986).

Berry'an was hired by Hughes Aircraft Company ("Hughes") on June 2, 1975 and worked for four divisions within Hughes before his termination. At the time Berry'an was hired, he made misrepresentations about his academic credentials. While employed at Hughes, Berry'an received verbal and written warnings about his attendance and work habits.[1] He was warned that he would be terminated if he did not improve his allegedly poor work habits.

On September 22, 1982, Berry'an was asked to seek alternative employment within or outside Hughes. Thereafter, he applied for employment in other departments within Hughes and also for employment outside Hughes. Hughes did not transfer him to another department. While seeking another job, Berry'an applied for jobs beyond his qualifications.

On March 14, 1983, Berry'an was suspended for three days without pay for continued failure to correct his allegedly poor work habits. Berry'an filed a complaint with Hughes and after an investigation, a Hughes Em-

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[1]Berry'an was warned to correct his deficient work habits as follows: appraisal report by Cardella and Lemestre, March 1977; appraisal report by Peay, October 1977; appraisal report by Chin, September 1980; written warning by Sugden, August 1981; appraisal report by Ruysser, September 1981; appraisal report by Tong, July 1982, Memorandum to Tong by Sterba, February 1983, written warning by Tong, February 1983.

ployee Relations Representative concluded that his suspension for poor attendance was justified. Thereafter, Hughes' management decided to discharge Berry'an if he did not find alternative employment before June 17, 1983.

Several weeks after his suspension, Berry'an received an allegedly derogatory newspaper excerpt through Hughes' interoffice mail.

From 1976 to 1982, Berry'an received an annual weekly salary increase. His salary increase averaged approximately ten percent each year. In May 1982, Berry'an was promoted and awarded a special salary increase of twenty-six percent.

Hughes discharged Berry'an on June 18, 1983. He filed a charge of discrimination with the Equal Employment Opportunity Commission (EEOC) in July 1983. In June 1984, the EEOC issued Berry'an a right to sue letter. On August 8, 1984, Berry'an filed a pro se complaint against Hughes. After a bench trial, the district court granted judgment for Hughes, and adopted Hughes' proposed findings of fact and conclusions of law. On February 21, 1986, the district court granted Hughes' motion for $10,000 in attorneys fees. Berry'an timely appeals.

There are two issues before this court:

1. Did the district court clearly err in failing to find that Hughes racially discriminated against Berry'an?

2. Did the district court abuse its discretion in awarding Hughes attorney fees?

On each issue we hold there was no error.

I

Discrimination Claims

A. Standard of Review

Since this case was fully tried, we review the district court's factual findings as to Title VII discrimination under the clearly erroneous standard. *Casillas*, 735 F.2d at 342. Appellate review focuses not upon whether the prima facie case was established but upon the ultimate question of discrimination. *Id.* at 343-44. The ultimate burden of proof, despite shift in the burden of production, remains with the employee. *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981).

B. Termination

Berry'an contends that he was terminated because of his race and that he has established the prima facie requirements for discriminatory discharge. He states that he is a member of the black race. He argues he was a satisfactory employee when discharged and that he was replaced by a white worker. Moreover, Berry'an asserts that Hughes fabricated evidence of tardy attendance and deficient work habits.

To establish a prima facie case of discriminatory discharge, Berry'an must prove that he belongs to a racial minority, that he was performing satisfactorily when he was terminated, and that Hughes sought a replacement with qualifications similar to his own. *Sengupta v. Morrison-Knudsen Co., Inc.*, 804 F.2d 1072, 1075 (9th cir. 1986).

The district court properly found that Berry'an was neither performing satisfactorily nor replaced. Other than his own testimony, Berry'an offered no evidence that Hughes falsely altered his records. Hughes' personnel file

on Berry'an chronicled the numerous warnings he received concerning his deficient work habits. In addition, Berry'an misstated his time cards and had difficulty working with others. Moreover, Hughes did not attempt to replace Berry'an. Thus, Berry'an did not satisfy the requirements for establishing discriminatory termination. *See id.*

C. Transfer

Berry'an contends that he applied for numerous positions within Hughes but was denied a transfer because of his race. He states that he was qualified for the position for which he applied. In addition, Berry'an states that Hughes, after refusing his application, continued to seek applications from persons with his same qualifications.

To establish a prima facie case of discrimination, Berry'an was required to show that he belongs to a racial minority, that he applied for a position for which he was qualified, that he was rejected, and that thereafter the position remained open and that Hughes continued to seek applicants with qualifications similar to his own. *Mitchell*, 805 F.2d at 846 (citing *McDonnell Douglas v. Green*, 411 U.S. 792, 802 (1973)). Alternatively, Berry'an may establish a prima facie case by offering evidence that creates an inference that Hughes based its employment decision on discriminatory criteria. *Id.* (citing *Teamsters v. United States*, 431 U.S. 324, 358 (1977)). Once Berry'an establishes a prima facie case, Hughes' burden is to articulate a legitimate nondiscriminatory reason for rejecting Berry'an. *Id.* Then Berry'an must prove that Hughes' articulated reason was a pretext. *Id.* (citing *McDonnell Douglas*, 411 U.S. at 807).

The district court properly found that Hughes did not deny Berry'an a transfer position because of his race. The

record reveals that Berry'an either was not qualified for the positions for which he applied or that the positions were closed. Moreover, even if he had established a prima facie case, Hughes' articulated reason for not selecting Berry'an was not pretext because Berry'an was an unsatisfactory employee.

D. Equal Pay

Berry'an alleges that salary decisions made by Hughes in 1982 and 1983 were based on race. He also states that he performed tasks at a level higher than that for which he was paid.

In his wage discrimination claim, however, Berry'an failed to establish the ultimate issue of race discrimination. *See EEOC v. Inland Marine Industries*, 729 F.2d 1229, 1234 (9th Cir.), *cert. denied*, 469 U.S. 855 (1984). Even though his assigned duties were greater than his classification requirements, Hughes awarded Berry'an lower salary increases because he was not dependable, not punctual, and maintained generally poor work habits.

E. Harassment

Berry'an contends he suffered a continuing and extensive course of harassment of which Hughes was aware and failed to take reasonable steps to remedy. He alleges that he was harassed because: (1) he received a derogatory newspaper excerpt; (2) he was suspended; and (3) his supervisor recommended that he not be rehired. He also argues that he was continually harassed regarding his work habits.

To succeed on a claim of discriminatory harassment, Berry'an must prove that he was subjected to a continuing and extensive course of harassment, and that Hughes

failed to take reasonable steps to remedy the harassment. *Silver v. KCA, Inc.,* 586 F.2d 138, 141-42 (9th Cir. 1978).

Except for his own testimony, Berry'an has offered no evidence that Hughes falsely accused him of maintaining deficient work habits. Hughes, however, presented testimony of numerous witnesses supporting the allegation that Berry'an maintained poor work habits. In addition, after conducting an investigation an employee representative found Berry'an's suspension justified. Therefore, the suspension and recommendation do not show that Berry'an was harassed. Moreover, although Berry'an received a derogatory newspaper excerpt through Hughes' interoffice mail, he concedes that he received no other derogatory documents and that he heard no derogatory remarks while employed by Hughes. Thus, because Berry'an was not subjected to extensive or continuous harassment, he has not established a claim for harassment.

II

Attorney Fees

The award of attorney fees falls within the discretion of the trial court and will not be disturbed absent an abuse of discretion. *Mitchell,* 805 F.2d at 846.

In requesting attorney fees on appeal, Berry'an implicitly argues that Hughes was not entitled to attorney fees below.[2]

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[2]Berry'an argues that he is entitled to attorney fees on appeal because he has established various Title VII and 42 U.S.C. § 1981 violations. As previously discussed, however, Berry'an has failed to establish the ultimate issue of discrimination, and therefore, because he is not a prevailing party he is not entitled to attorney fees on appeal. 42 U.S.C. § 2000e-5(k). Hughes does not seek attorney fees at

Attorney fees may be awarded against a plaintiff in a Title VII case where the district court finds the claim "frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so." *Christianburg Garmet Co. v. EEOC,* 434 U.S. 412, 422 (1978); *Mitchell,* 805 F.2d at 847-48.

Here, the district court properly awarded Hughes attorney fees. Berry'an based his action on frivolous grounds and misrepresentations. He misrepresented his qualifications and credentials, and misstated his time cards. Since this action resulted in the needless expenditure of litigation expenses, the district court did not abuse its discretion in awarding Hughes attorney fees. *See id.*

The district court's judgment is AFFIRMED.

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this time but states that if it prevails on appeal it may seek fees pursuant to 42 U.S.C. § 2000e-5(k).1.

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 1706 Maple Avenue, Los Angeles, California.

On October 21, 1987, I served the within Brief in Opposition in re: "David Berry'an vs. Hughes Aircraft Company" in the United States Supreme Court, October Term 1987, No. 87-512;

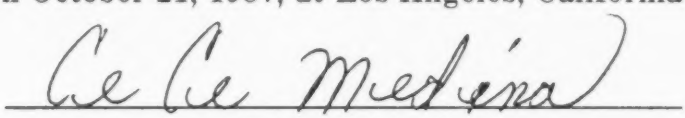
On the Parties in said action, by placing Three copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

David Berry'an
606 Levering Avenue #216
Los Angeles, California 90024

All parties required to be served have been served.

I certify (or declare), under penalty of perjury, that the foregoing is true and correct.

Executed on October 21, 1987, at Los Angeles, California



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